(1)

FILED

97 1260 JAN 29 1998

No. 97-

OFFICE OF THE CLERK

In The Supreme Court of the United States

OCTOBER TERM 1997

CLYDE E. CLEMENTS, JR.,

Petitioner,

v.

THE BABCOCK & WILCOX COMPANY, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

CLYDE E. CLEMENTS, JR.
Post Office Box 3391
Lynchburg, Virginia 24503
(804) 384-3711

Pro Se Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

190 pp

QUESTIONS PRESENTED FOR REVIEW

1. Petitioner filed in state court those state claims struck from his federal suit; and argued before the state courts that defendants' plea of res judicata, collateral estoppel and timeliness defense do not apply because the federal courts denied him an opportunity to fully and fairly litigate. The judgment of the state court of first instance does not address said Petitioner's argument. Does the Supreme Court of Virginia's grounding its refusal of Petitioner's Petition for Appeal on its finding of no reversible error represent insufficient independent and inadequate state grounds, or otherwise inadequate grounds, where a federal question was properly brought before it, thereby establishing this Court's jurisdiction to hear said federal question?

2. It is an undisputed fact that the federal court of first instance did not give a reason for its striking the state claims from Petitioner's case before it. The state court of first instance sustained defendants' plea of res judicata on ground that the federal court apparently grounded its striking said state claims on Rule 12(f) of the Federal Rules of Civil Procedure. Does the Supreme Court of Virginia's grounding its refusal of Petitioner's Petition for Appeal on its finding of no reversible error represent insufficient independent and inadequate state grounds, or otherwise inadequate grounds, where federal question of misapplication of Federal Rules was properly brought before it, thereby establishing this Court's jurisdiction to hear said federal question?

PARTIES TO THE PROCEEDING

PETITIONER-PLAINTIFF: Clyde E. Clements, Jr.

RESPONDENT-DEFENDANTS: The Babcock & Wilcox Company; Employee Assistance of Central Virginia, Incorporated; Frank C. Allen, Jr.; Merle T. Alvis; Laurie L. Boykan; James A. Conner; John P. Eckert; John A. Fees; Susan S. Grainger; Robert E. Howson; Dewitt T. Lefew, III; Lawrence L. Lineberry; Lonza R. Pagans, Jr.; George K. Slough; Steven W. Smith; and Roger E. Tetrault.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS ..... iii, iv

TABLE OF AUTHORITIES ..... v, vi, vii

OPINIONS AND ORDERS OF THE COURTS BELOW . 1

STATEMENT OF JURISDICTION IN THIS COURT ... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 13

I. The Supreme Court of Virginia's Ground of No Reversible Error Is an Insufficient Independent and Inadequate Ground Where the Federal Question Whether the Federal Courts Denied Petitioner an Opportunity to Fully and Fairly Litigate Was Properly Brought Before it 13

TABLE OF CONTENTS
(CONT'D)

II. State Courts' Applying Rule 12(f) of Federal Rules of Civil Procedure as Federal Court's Apparent Reason for Striking Petitioner's State Claims, Where it Is Undisputed Fact That Federal Court Gave No Reason for Striking Said Claims Is Misapplication of Federal Rules That must Be Corrected by this Court 23

III.Many Are Affected 26

IV.The Questions Presented Are Important 26

CONCLUSION 27

APPENDIX .....

TABLE OF AUTHORITIES

Cases

Bailey v. Scott-Gallaher, Inc., 253 Va. 121, 480 S.E.2d 502 (Va. 1997) 11, 12

BMW of North America, Inc. v. Gore, 116 S.Ct. 1589 (1996) 23

Bryant v. Zimmerman, 278 U.S. 63 (1928) 14

Carlson v. Curtiss, 234 U.S. 103 (1914) 18

Chapman v. Goodnow, 123 U.S. 540 (1887) 17

F.D.I.C. v. Cocke, 7 F.3d 396 (4th Cir. 1993) 20

Fiske v. Kansas, 274 U.S. 380 (1927) 21, 27

Hankerson v. Moody, 329 S.E.2d 791 (Va. 1985) ... 15, 25

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 13

Lawrence Chrysler Plymouth Corp. v. Brooks, 465 S.E.2d 806 (Va. 1996) 11

Lockhart v. Commonwealth Educ. Systems Corp., 439 S.E.2d 328 (Va. 1994) 11

Matsushita Elec. Indus. v. Epstein, 516 US __, 134 L.Ed.2d 6 (1996) 13

TABLE OF AUTHORITIES
(CONT'D)

Cases

Merchants' Nat'l Bank v. Richmond, 256 U.S. 635 (1921) 26, 27

Richmond Redev. & Hous. Auth.v. Laburnum Constr. Corp, 195 Va. 827, 80 S.E.2d 574 (1954) 19

Rogers v. Alabama, 192 U.S. 226 (1904) 17

Southern P. Co. v. Schuyler, 227 U.S. 601 (1913) 18

United States v. Carver, 260 U.S. 482 (1923) 22

Federal Statutes

Title VII of Civil Rights Act of 1964, as amended 3

Fourteenth Amendment to U.S. Constitution .. 1, 13, 14, 23

28 U.S.C. Federal Rules of Civil Procedure, Rule 12(f) 4, 7, 8, 12, 23, 24, 25, 26

28 U.S.C.A. Rules, United States Court of Appeals for the Fourth Circuit Local Rules, Rule 40(d) 22

28 U.S.C. § 1257 1

28 U.S.C.S. § 1738 ..... 1, 13

TABLE OF AUTHORITIES
(CONT'D)

Virginia Statutes

Rules of the Supreme Court of Virginia, Rule 3:16(b) 4

Rules of the Supreme Court of Virginia, Rule 5:17 15

Va. Code Ann., Art. I, § 11 (1950) 21

Virginia Human Rights Act (Va. Code Ann.,
§ 2.1-714. (1950)) 11

Va. Code Ann. § 8.01-243(A) (1950) 6, 8

Va. Code Ann. § 8.01-680 (1950) 25

OPINIONS AND ORDERS OF THE COURTS BELOW

The Order and opinion of the Circuit Court of Campbell County, Commonwealth of Virginia are reproduced in the Appendix, *infra*, at App. 3, 5. The Orders of the Supreme Court of Virginia are reproduced in the Appendix, *infra*, at App. 1, 2.

STATEMENT OF JURISDICTION IN THIS COURT

The Supreme Court of Virginia entered its Order denying my Petition for Rehearing on October 31, 1997 (App. 1); and entered its order refusing my Petition for Appeal on September 9, 1997 (App. 2). Jurisdiction of this Court is conferred under 28 U.S.C. § 1257. No motion for extension of time for filing a Petition for Certiorari has been filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

AMENDMENT XIV OF THE UNITED STATES CONSTITUTION

* * * nor shall any state * * * deprive any person of life, liberty, or property, without due process of law * * *.

28 U.S.C.S. § 1738

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

---

STATEMENT OF THE CASE

I, Clyde E. Clements, Jr., pro se Petitioner-Plaintiff, am 51 years old. At the time of the events giving rise to this litigation, I was employed by the Naval Nuclear Fuel Division ("NNFD") of the Babcock & Wilcox Company ("B&W") as an engineer. I was hired by B&W, on June 18, 1984; and I was fired by B&W without notice on September 21, 1992.

Ten (10) days after the federal court of first instance, United States District Court for the Western District of Virginia, Lynchburg Division ("District Court") struck the state claims and some defendants from my employment discrimination suit without giving a reason for doing so, I filed the same state claims in the Circuit Court of Campbell County, Commonwealth of Virginia ("Circuit Court"), against the same defendants who were parties to my federal suit prior to said striking of defendants.

I also filed with the Circuit Court a motion for leave to amend, together with my proposed Second Amended Motion for Judgment.

Defendants filed a plea of res judicata, collateral estoppel and demurrer, as well as a timeliness defense; and their brief in opposition to my motion for leave to amend. In response, I filed Plaintiff's Memorandum of Law in Opposition to Defendants' Plea in Bar and Demurrer ("Plaintiff's Memorandum"), which is reproduced and attached hereto in the Appendix at App. 71.

The Federal Questions

In Plaintiff's Memorandum I argue that defendants' plea of res judicata and collateral estoppel, and their timeliness defense do not apply because the federal courts denied me an

opportunity to fully and fairly litigate by preventing me from completing my discovery, and by disregarding facts of record in support of my claims (App. 78-88, 100-108).

I filed the following supporting evidence in the form of certified true copies from the District Court record, as exhibits in the accompanying Plaintiff's Appendix In Opposition to Defendants' Plea in Bar and Demurrer ("Plaintiff's Appendix"): (a) B&W Disciplinary Report, in which B&W states that I was fired for accusing B&W management in my writings of harassing, discriminating against, retaliating against, and attempting to inflict severe emotional distress on me; (b) EEOC Determination that states, in part, "The evidence of record supports Charging Party's allegation that he was discharged in part in retaliation for opposing practices made unlawful by Title VII."; (c) transcript of Defendant Conner's deposition during which he responded "No" to my question, "Do you have any reason to believe that I was a disloyal employee?"; (d) District Court docket sheets that show that the District Court: denied my motion for extension of time to complete my discovery while granting defendants' two motions for extension of time to respond to my complaint, quashed my subpoenas for discovering facts relating to the unexplained disappearance of documents from my confidential record maintained by defendant Employee Assistance of Central Virginia, and denied me a hearing of my motion to compel the defendants to answer my discovery requests while granting defendants' motion to stay discovery without a hearing; (e) transcript of the District Court's hearing of defendants' motion for summary judgment, which shows that I brought to the court's attention said B&W Disciplinary Report and the Conner deposition, and; (f) District Court's Order and memorandum opinion granting defendants' motion for summary judgment in its entirety. Said memorandum opinion shows that the District Court did not address the evidence of record in support of my

retaliatory discharge claim, including said B&W Disciplinary Report, EEOC Determination and Conner deposition transcript.

I also presented my arguments during the Circuit Court's hearing of defendants' plea in bar and demurrer, and of my motion for leave to amend ("Hearing"), excerpts from the transcript of which are reproduced and attached hereto in the Appendix at App. 124. Please see transcript, App. 126-135.

The transcript of said Hearing also documents that it is an undisputed fact that the District Court did not give a reason for striking the state claims and some defendants from my federal suit (App.125). The District Court Order is reproduced in the Appendix attached hereto at App. 150.

During said Hearing I, expressly or by intendment moved the Court: for leave to amend my Second Amended Motion for Judgment if the Court found it to be inadequate as a matter of law, and; to have defendants amplify their pleading, pursuant to Rule 3:16(b), Rules of the Supreme Court of Virginia (App. 135, 136). The Circuit did not rule on, nor respond in any other way, to said motions.

The Circuit Court sustained defendants' plea in bar and demurrer in its entirety, and denied my motion for leave to amend (App. 3), stating in its letter opinion, a reproduction of which is attached hereto in the Appendix at App. 5:

> * * * The defendants assert that this count is barred under the doctrine of res judicata. This Court agrees. The United States District Court Judge, by order of September 9, 1994, struck this count (labeled Count Five) from the Complaint. Under Rule 12(f) of the Federal Rules of Civil Procedure, the court may order stricken from a pleading "....any redundant, immaterial, impertinent, or scandalous matter." It is clear from reviewing the pleadings of the

Complaint in federal court, that the allegations supporting that case are the same allegations supporting the instant case. Although the United States District Court judge did not clearly state, it is apparent that Count Five of the Complaint was merely redundant of the federal causes of action that were pled. The Fourth Circuit Court of Appeals and the United States Supreme Court agreed. Therefore, this was a final judgment on the merits in the same cause of action between the same parties. Thus, the plea of res judicata is sustained.

Additionally, the defendants' plea of collateral estoppel is also sustained. In its Memorandum Opinion granting summary judgment to Count Two of the Second Amended Complaint, the United States District Court ruled that the same facts and allegations alleged to support the instant case were not sufficient to support the retaliatory discharge allegations of Count Two. * * * It is obvious that if the plaintiff in the instant case could not allege sufficient facts to demonstrate that B & W terminated him in retaliation for his actions with the EEOC, there are not sufficient allegations to support a claim for intentional infliction of emotional distress. There must, in the least, be outrageous conduct by B & W. The district court concluded this issue. Thus, collateral estoppel applies because this same factual issue was litigated between the parties in the prior proceeding and a final judgment was entered against the plaintiff.

*

*

*

Next, the defendants maintain that Count One is barred by the statute of limitations. Again, this Court agrees. * * * Thus, even using the two-year statute of limitations for personal injuries under § 8.01-243(A) of the Code of Virginia, the plaintiff's action for emotional distress has not been filed within the two-year statute of limitations. Count One is therefore time-barred.

Last, the defendants assert that the plaintiff's claim for intentional infliction of emotional distress fails to state a claim upon which relief can be granted. * * *

*

*

*

The allegations in the Motion for Judgment simply do not support the requirement of outrageous and intolerable conduct. * * * Thus, the Demurrer is sustained. (App. 9-11)

*

*

*

The Second Amended Motion for Judgment is a restatement of the same allegations as the Amended Motion for Judgment, except for invasion of privacy and civil conspiracy. There are no causes of action for invasion of privacy and civil conspiracy under Virginia common law. Thus, there are no new matters to act on in the Second Amended Motion for Judgment. (App. 16)

The Circuit Court applied essentially the same reasoning

to each Count of my motion for judgment.

The Circuit Court's opinion, *supra.*, is the first time the matter of Rule 12(f) of the Federal Rules of Civil Procedure was brought up in instant case.

Said Circuit Court Order and opinion do not address my argument that defendants' plea of res judicata, collateral estoppel and timeliness defense do not apply because the federal courts denied me an opportunity to fully and fairly litigate. Nor does it address my argument that all my claims are made timely filed by the tolling effect of the alleged conspiracy and fraudulent concealment by defendants to injure me.

I filed my Petition for Appeal, Record No. 970879 with the Supreme Court of Virginia, a reproduction of which is attached hereto in the Appendix at App. 39. "Assignment of Error" number 27. of my Petition for Appeal states, "The Court below erred in overlooking the facts of record in support of my assertion that the federal courts denied me an opportunity to fully and fairly litigate." (App. 46). "Questions Presented" number 3. of my Petition for Appeal states, "How did the Lower Court's failure to address my argument that the federal courts denied me a full and fair opportunity to litigate, affect the outcome below? (AE 27)" (App. 47).

In Section III.B. and C. of my Petition for Appeal I argue with specificity that the federal courts denied me an opportunity to fully and fairly litigate by preventing me from completing my discovery, including quashing my subpoenas for discovering facts relating to the unexplained disappearance of documents from my confidential record maintained by EACV (App. 57-59). Said facts are relevant to my allegation of conspiracy and fraudulent concealment by defendants; and, therefore, are relevant to my argument in Section VI. that all my claims in instant case are made timely by the tolling effect of the conspiracy and fraudulent concealment by defendants. (App. 67, 68)

In "Assignments of Error" numbers 2, 6, 10, 15 and 19 of my Petition for Appeal I state that the Court below erred in sustaining defendants' plea of res judicata on the ground that the District Court struck the state claims from my federal suit because of redundancy (App. 43-46); and "Questions for Review" number 6 of my Petition for Appeal states,

> Did the Court below err in finding that the District Court apparently grounded its striking of my common law claims and all defendants except B&W, Alvis, Conner and Tetrault, on redundancy under Rule 12(f) of the Federal Rules of Civil Procedure; and if so, how did it affect the outcome below? (AE 2, 6, 10, 15, 19) (App. 47)

In Section III. of my Petition for Appeal I argue with specificity that the Circuit Court's sustaining defendants' plea of res judicata on its finding of redundancy is in error because it is an undisputed fact that the District Court did not give a reason for its striking the state claims from my federal suit; that the record is devoid of any facts evidencing redundancy as the District Court's reason, and; that the defendants never alleged redundancy as the reason. (App. 56, 57).

In "Assignments of Error" numbers 5, 9, 13 and 17 I state that the Court below erred in sustaining defendants' statute of limitations defense regarding each of my claims. (App. 44, 45). "Questions Presented" number 7. states, "Did the Court below err in not ruling that Section 8.01-243(A) of the Code of Virginia applies to my claims at bar? (AE 5, 9, 13, 17)" (App. 47). And, in Section VI I argue with specificity that § 8.01-243(A) applies to my claims at bar. (App. 68).

Other Issues Relevant to the Federal Questions

In the Petition for Appeal I also address the Circuit Court's sustaining defendants' demurrer to each of my claims. In "Assignments of Error" numbers 4, 8, 12, and 22 I state that the Court below erred in sustaining defendants' demurrer to my intentional infliction of emotional distress, defamation and tortious interference with economic relationship claims; and that the Court below erred in denying my motion for leave to amend my Amended Motion for Judgment. (App. 44-46). Corresponding "Questions for Review" number 8. states,

> Did the Court below err in finding that my Second Amended Motion for Judgment is only a restatement of my Amended Motion for Judgment; and if so, what effect did it have on the outcome below? (AE 4, 8, 12, 22) (App. 47, 48).

I argue with specificity in Section V. that the Court below abused its discretion in denying my motion for leave to amend because my proposed Second Amended Motion for Judgment contains alleged facts in support of my claims that are not in my Amended Motion for Judgment; and I cite the numbers of the paragraphs of my proposed Second Amended Motion for Judgment in which they appear. (App. 65-67).

In my Petition for Appeal I properly brought before the Supreme Court of Virginia my argument that the Circuit Court's sustaining defendants' plea of res judicata on its finding that the previous federal suit and instant case are between the same parties, is in error. "Assignments of Error" number 1. states,

> The Court below erred in sustaining defendants' plea of res judicata and collateral estoppel on

> the ground that the federal District Court judgment was a final judgment between the *same parties* as those of instant case. (App. 43).

"Questions Presented" number 4. states, "How did the lower court's overlooking the fact that the parties to the District Court final judgment are not the same parties to instant case, affect the outcome below? (AE 1)" (App. 47). And, in Section III, I show that, by the time the District Court entered its final judgment, B&W, Alvis, Conner and Tetrault were the only defendants, since the District Court's Order granting defendants' motion for reconsideration had struck the others (App. 150). There are sixteen defendants in instant case.

Further, defendants filed with the Circuit Court at Tab 5 of their Appendix in Support of Defendants' Plea in Bar and Demurrer, a copy of the District Court's Order; and the Summary Judgment Opinion, the first page of which states that, "* * * the remaining defendants are as follow: Babcock & Wilcox Company ("B&W"), Merle T. Alvis ("Alvis"), James A. Conner ("Conner"), and Roger E. Tetrault ("Tetrault"). * * *" And, defendants, during said Hearing, discussed with the Circuit Court the District Court Order that struck the other defendants. (App. 124, 125). Defendants also filed with the Circuit Court at Tab 4 of their Appendix a copy of the District Court Order that struck the defendants.

I properly brought before the Supreme Court of Virginia my argument that the lower court erred in finding that I failed to allege a Virginia statute that has been violated by my discharge. "Assignments of Error" number 14. states,

> The Court below erred in sustaining defendants' demurrer to my wrongful discharge in violation of public policy claim on the ground that I have alleged no Virginia statute that has been

violated by my discharge. (App. 45).

"Questions Presented" number 9. states, "Did the Court below err in ruling that I have alleged no Virginia statute that has been violated by my discharge? (AE 14)" (App. 48). I argue in Section IV.D. of my Petition for Appeal that I cited the Virginia Human Rights Act in my Motion for Judgment, Amended Motion for Judgment and in my proposed Second Amended Motion for Judgment. I also cite Bailey v. Scott-Gallaher, Inc., 253 Va. 121, 480 S.E.2d 502 (Va. 1997), which was decided by the Supreme Court of Virginia three (3) days after the Circuit Court decided instant case in favor of the defendants. The Bailey court ruled that:

> * * * we noted in Lockhart that while the cause of action for wrongful termination based on gender discrimination arose independently from the Virginia Human Rights Act, the public policy articulation in that Act satisfies our requirement in Lawrence Chrysler Plymouth Corp. for identifying a statutory embodiment of the public policy of the Commonwealth. (App. 65)

On August 28, 1997 I presented oral argument in support of my Petition for Appeal before the Supreme Court of Virginia. I again argued with specificity my key assertion that the federal courts denied me an opportunity to fully and fairly litigate, and disregarded facts of record in support of my claims; therefore, defendants' plea of res judicata and collateral estoppel and timeliness defense do not apply. Also, I physically showed the Justices the exhibits attached to my proposed Second Amended Motion for Judgment in support of my defamation claim, which are not attached to the Amended

Motion for Judgment.

The Supreme Court of Virginia subsequently refused my Petition for Appeal, stating in its Order, "* * * the Court is of opinion there is no reversible error in the judgment complained of." (App. 2).

I timely filed my Petition of Appellant for Rehearing with the Supreme Court of Virginia, a reproduction of which is attached hereto in the Appendix at App. 18, in which I argue with specificity that the District Court's disregarding the facts of record in support of my retaliatory discharge claim is prejudicial error; and that the Circuit Court's relying on the District Court's said prejudicial error, even though I had filed with the Circuit Court evidence of retaliatory discharge, is reversible error. (App. 27-30). Further, I argue that the Circuit Court's sustaining defendants' demurrer is reversible error because the Circuit Court disregarded those alleged facts in support of my claims that are in my proposed Second Amended Motion for Judgment, but are not in my Amended Motion for Judgment. I cite the pages of my Petition for Appeal that, in turn, cite the paragraphs in which they appear. I also argued that the Supreme Court of Virginia erred in disregarding my citing of Bailey, *supra.* (App. 30, 31, 35, 36).

And, I argue with specificity that the Circuit Court grounded its sustaining defendants' plea of res judicata, and its disregarding my argument of common law conspiracy on its suspicion that the District Court struck my state claims because of redundancy, Rule 12(f), Federal Rules of Civil Procedure is also reversible error (App. 32, 33).

On October 31, 1997 the Supreme Court of Virginia entered its Order denying my Petition for Rehearing. (App. 1).

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT OF VIRGINIA'S GROUND OF NO REVERSIBLE ERROR IS AN INSUFFICIENT INDEPENDENT AND INADEQUATE GROUND WHERE THE FEDERAL QUESTION WHETHER THE FEDERAL COURTS DENIED PETITIONER AN OPPORTUNITY TO FULLY AND FAIRLY LITIGATE WAS PROPERLY BROUGHT BEFORE IT.

A. Denial of Opportunity to Fully and Fairly Litigate Entails Denial of Right to Due Process of Law Guaranteed by Fourteenth Amendment to U.S. Constitution.

Justice Ginsburg, in her dissenting opinion, with whom Justice Stevens joins, states in Matsushita Elec. Indus. v. Epstein, 516 US __, 134 L Ed 2d 6 at 26 (1996):

> I write separately to emphasize a point key to the application of 1738: A state-court judgment generally is not entitled to full faith and credit unless it satisfies the requirements of the Fourteenth Amendment's Due Process Clause. See *Kremer*, 456 U.S., at 482-483, 72 L Ed 2d 262, 102 S Ct 1883. * * *

Note 24, page 483 of Kremer, *supra*, states:

> The Court's decisions enforcing the Full Faith and Credit Clause of the Constitution, Art IV, § 1, also suggest that what a full and fair opportunity to litigate entails is the procedural requirements of due process. * * *.

It therefore logically follows that, by my arguing before the state courts that the federal courts in the previous suit denied me an opportunity to fully and fairly litigate, I raised the federal question whether the federal courts denied me my right to due process of law guaranteed me by the Fourteenth Amendment to the United States Constitution.
("Federal Question of Due Process").

> * * * No particular form of words or phrases is essential, but only that the claim * * * and the ground therefor be brought to the attention to the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

B. This Court Has Jurisdiction to Hear Federal Question of Due Process.

1. Federal Question of Due Process Was Properly Brought Before the State Courts.

In Plaintiff's Memorandum of Law In Opposition to Defendants' Plea in Bar and Demurrer ("Plaintiff's Memorandum"), a reproduction of which is included in the Appendix attached hereto at App. 71-123, I argue with specificity that defendants' plea of res judicata, collateral estoppel and timeliness defense do not apply because the federal courts denied me an opportunity to fully and fairly litigate by preventing me from completing my discovery; and by disregarding facts of record in support of my claims - in

particular, my retaliatory discharge claim. And I refer to the supporting evidence that is in the form of certified true copies of documents from the District Court records contained in Plaintiff's Appendix In Opposition to Defendants' Plea in Bar and Demurrer ("Plaintiff's Appendix"). (App. 78-88, 100-108). The District Court then compounded its error by granting defendants' motion for summary judgment on the ground that I had submitted insufficient evidence in support of my claims.

Defendants have never taken my deposition; therefore, I am an unimpeached witness. In Virginia, a court's disregarding uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with the facts of record is reversible error:

> * * * The trier of fact must determine the weight of the testimony and the credibility of the witnesses, but it "may not arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with the facts of record." * * *

Hankerson v. Moody, 329 S.E.2d 791 (Va. 1985) at 794.

Rules of the Supreme Court of Virginia, Rule 5:17. PETITION FOR APPEAL, (c) Form and Content., states, in relevant part:

> * * * Under a separate heading entitled "Assignments of Error," the petition shall list the specific errors in the rulings below upon which the appellant intends to rely. * * * Under another separate heading entitled "Questions Presented," the petition shall list the question upon which the appellant intends to submit argument, with a clear and exact

> reference to the particular assignment of error to which each question relates. * * * The petition shall also contain: * * * (4) The principles of law, the argument, and the authorities relating to each assignment of error. * * *

My Petition for Appeal to the Supreme Court of Virginia is reproduced in its entirety in the Appendix attached hereto, at App. 39-70. "Assignment of Error" number 27. of my Petition for Appeal states, "The Court below erred in overlooking the facts of record in support of my assertion that the federal courts denied me an opportunity to fully and fairly litigate." (App. 46). "Questions Presented" number 3. of my Petition for Appeal states, "How did the Lower Court's failure to address my argument that the federal courts denied me a full and fair opportunity to litigate, affect the outcome below? (AE 27)" (App. 47).

In Section III.B. and C. of my Petition for Appeal I argue with specificity that the federal courts denied me an opportunity to fully and fairly litigate (See App. 57-59).

2. The State Courts Evaded the Federal Question of Due Process Properly Brought Before Them.

The Order and letter opinion of the state court of first instance, the Circuit Court of Campbell County, Commonwealth of Virginia, which are reproduced in the Appendix attached hereto at App. 3, 5, do not address my argument that the defendants' plea of res judicata, collateral estoppel and timeliness defense do not apply because the federal courts denied me an opportunity to fully and fairly litigate.

The Supreme Court of Virginia's Order states, "* * *

the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal." (App. 2). I properly brought before the Supreme Court of Virginia the Federal Question of Due Process that was properly brought before, and disregarded by the Circuit Court. It therefore logically follows that the Supreme Court of Virginia found no reversible error in the lower court's disregarding the federal question properly brought before it.

In Rogers v. Alabama, 192 U.S. 226, (1904), Mr. Justice Holmes delivered the opinion:

> * * * It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. * * * In *Chapman v. Goodnow*, 123 U.S. 540, 547, 548, 31 L. ed. 235, 238, 8 Sup. Ct. Rep. 211, where the parties sought to avoid the obligation of a former decree by new matter, this court said that the effect of what was done was not a Federal question, but proceeded to inquire in terms whether that ground of decision was the real one, or whether it was set up as an evasion, and merely to give color to a refusal to allow the bar of the decree. We are of opinion that the Federal question is raised by the record * * *

Rogers, *supra.*, at 230, 231.

3. This Court Is Justified in Reviewing the Facts of Record.

This Court has on occasion found it necessary to review the record for itself where, as here, it appears the state highest court's judgment is not fairly supported by the facts of record:

> * * * While, in ordinary cases, we are bound by the findings of the state court of last resort respecting matters of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a Federal right, any more than it could do so by making findings that were wholly without support in the evidence. And just as this court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a Federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom, and which would furnish a basis for the asserted Federal right. Southern P. Co. v. Schuyler, 227 U.S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277, and cases cited.

Carlson v. Curtiss, 234 U.S. 103, 106 (1914).

One of the more glaring indications that the Supreme Court of Virginia's judgment is not fairly supported by the record is its finding no reversible error in the Circuit Court's sustaining defendants' plea of res judicata on its finding that

the District Court final judgment is between the same parties as my state court action. (App. 9, 10). The case at bar has sixteen defendants; the defendants subject of the District Court's final judgment is four. I brought this error to the Supreme Court of Virginia's attention in "Assignments of Error" number 1. and "Questions for Review" number 4. of my Petition for Appeal (App. 43, 47, 55, 56); and again in my Petition for Rehearing. (App.35).

I pointed out to the Circuit Court in Plaintiff's Memorandum that the issue whether my claims were timely filed in the Circuit Court would be more appropriately addressed after discovery and after the evidence has been filed by the court, since I allege conspiracy by defendants to injure me, and fraudulent concealment, both of which have a tolling effect on all my claims at bar. (App. 88). I also presented this point during the Circuit Court's hearing of defendants' plea in bar and demurrer. (App. 134). The Order and opinion of the Circuit Court (App. 3, 5) do not address my argument that all my claims at bar are timely because I allege conspiracy, obstruction of my discovery and fraudulent concealment (App. 87-108).

> . . . the Virginia Supreme Court has required intentional conduct to allow the doctrine [of equitable estoppel] to toll the running of a statute of limitations. The court held that '. . . A defendant must intend to conceal the discovery of the cause of action by trick or artifice and must have thus actually concealed it from the plaintiff in order for the exception to apply.' *Richmond Redev. & Hous. Auth. v. Laburnum Constr. Corp.*, 195 Va. 827, 840, 80 S.E.2d 574, 582 (1954).

F.D.I.C. v Cocke, 7 F.3d 396 (4th Cir. 1993) at 402. Brackets and their contents added.

The Circuit Court sustained defendants' demurrer. The lower court states in its opinion:

> * * * The Second Amended Motion for Judgment is a restatement of the same allegations as the Amended Motion for Judgment, except it adds a count for invasion of privacy and civil law conspiracy. * * * (App. 16).

By so stating, the Circuit Court admits that it did not consider those facts alleged in my proposed Second Amended Motion for Judgment that do not appear in my Amended Motion for Judgment. In Plaintiff's Memorandum I cited for the Circuit Court the paragraph numbers of the alleged facts in the proposed Second Amended Motion for Judgment relating to the claims at bar, some of which do not appear in the Amended Motion for Judgment. (App. 95, 99-101, 107-111, 113-116, 119-121). It therefore logically follows that the Circuit Court's sustaining defendants demurrer; and its denying my motion for leave to amend, are in error. I properly brought these errors to the attention of the Supreme Court of Virginia in my Petition for Appeal via "Assignments of Error" numbers 4, 8, 12, 22, 24 and 26; and "Questions Presented" numbers 2 and 8. (App. 44-48. See also App. 62-67).

I properly brought before the Supreme Court of Virginia the Circuit Court's reversible error of grounding its sustaining defendants' plea of collateral estoppel on the District Court's error of finding that I had submitted insufficient evidence in support of my retaliatory discharge claim. The District Court granted defendants' motion to stay

discovery that was filed on the same day I filed my motion to compel defendants to answer my discovery requests, thereby denying me a hearing of my motion to compel. In said motion to compel I specifically requested that the motion to compel be heard during the hearing of defendants' motion for summary judgment, which had already been set. Said hearing took place as scheduled, but my motion to compel was never heard. The District Court then compounded its error by granting defendants' motion for summary judgment in its entirety, on the ground that I had submitted insufficient evidence in support of my retaliatory discharge claim. I address the Circuit Court's errors relating to my wrongful termination claim in "Assignments of Error" numbers 14-17, 25; and in "Questions for Review" numbers 7, 9. (App. 45, 46-48). I present a detailed argument in Section III. of my Petition for Appeal. (App. 55-58).

> The Supreme Court will review findings of fact by a state court, where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary to analyze facts in order to pass on federal question.

Fiske v. Kansas, 274 U.S. 380 at 380 (1927)

B. Petitioner's Due Process Argument is Federal Constitutional Question -- Not State Constitutional Question.

Although Virginia's Constitution has a due process clause (Constitution of Virginia, Art. I, § 11.), my arguing

before the state courts that the federal courts denied me an opportunity to fully and fairly litigate is a federal Constitutional question for the following reasons:

1. Federal Question of Due Process Was Litigated In, but Not Decided by the Federal Courts.

My Petition for Writ of Certiorari, Record No. 95-1314, a copy of which I filed with the Circuit Court during its hearing of defendants' plea in bar and demurrer (See transcript of the hearing, App. 133), documents that I, expressly or by intendment brought to the attention of the federal appeals court - and to the attention of this Court - that the federal District Court denied me an opportunity to fully and fairly litigate. On April 15, 1996 this Court entered its Order denying my petition for a writ of certiorari. (App. 141). Because this Court's denial does not mean that the merits of my petition were reached, my argument that the federal courts denied me an opportunity to fully and fairly litigate was never decided by the federal courts:

> [t]he denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times.

United States v. Carver, 260 U.S. 482, 490 (1923)

Further, I filed with the federal Appeals Court a motion to vacate its judgment, in which I specifically argue that the federal courts denied me an opportunity to fully and fairly litigate. The Appeals Court dismissed said motion on the grounds that its Local Rule 40(d) does not allow it to entertain requests for relief after denial of petition for rehearing. I challenged the constitutionality of said Local Rule 40(d) via my Petition for Writ of Certiorari, Record No.

96-1360, which was subsequently denied. Please note that the defendants filed with the Circuit Court a copy of the Motion to Vacate judgments I mailed to the Clerk of the federal Appeals Court for filing, but was returned to me without filing. Please see the reproduction of the federal Appeals Court Clerk's letter and said Motion at App. 142-144.

It therefore logically follows that, because the federal Appeals Court's grounds for dismissing my Motion to Vacate is jurisdictional in nature, the issue whether the federal courts denied me an opportunity to fully and fairly litigate was never decided. And, because said issue was originally litigated in the federal courts, it logically follows that it is a federal constitutional question.

Lastly, the state courts, by their disregarding said Federal Question of Due Process that was litigated in but not decided by the federal courts, have also denied me my right to due process guaranteed me by the Fourteenth Amendment to the United States Constitution.

II. THE STATE COURTS' APPLYING RULE 12(f) OF FEDERAL RULES OF CIVIL PROCEDURE AS FEDERAL COURT'S APPARENT REASON FOR STRIKING PETITIONER'S STATE CLAIMS, WHERE IT IS UNDISPUTED FACT THAT FEDERAL COURT GAVE NO REASON FOR STRIKING SAID CLAIMS IS MISAPPLICATION OF FEDERAL RULES THAT MUST BE CORRECTED BY THIS COURT.

Justice Ginsburg, with whom Chief Justice Rehnquist joins, in her dissenting opinion of BMW of North America, Inc. v. Gore, 116 S Ct 1589 at 1616, 1617 (1996) (Ginsburg, J. and Rehnquist, J., dissenting), states,

> * * * The decision leads us further into territory traditionally within the States' domain, and commits the Court, now and again, to correct "misapplication of a properly stated rule of law." * * * The Court is not well equipped for this mission. * * * It has only a vague concept of substantive due process, a "raised eyebrow" test * * * as its ultimate guide.

Applying said "raised eyebrow test" to the federal question whether the state courts misapplied Rule 12(f) of the Federal Rules of Civil Procedure in instant case will no doubt result in requirement of review by this Court for the following reasons:

A. The Circuit Court's Sustaining Defendants' Plea of Res Judicata on Ground That the District Court Apparently Grounded its Striking Petitioner's State Claims from His Federal Suit on Rule 12(f) of Federal Rules of Civil Procedure Is Not Supported by Facts of Record.

It is an undisputed fact that the District Court did not give a reason for its striking the state claims from my federal suit. The District Court's Order is reproduced in the Appendix attached herein, at App. 150. Please see the transcript of the Circuit Court's hearing of defendants' plea in bar at App. 125, 134, which documents that all parties agreed that the District Court did not give a reason for its striking said state claims.

The Circuit Court states in its judgment,

> Although the United States District Court judge did not clearly state, it is apparent that Count Five of the Complaint was merely redundant of

the federal causes of action that were pled. (App. 9)

The Circuit Court relies on the same reasoning - redundancy - for its sustaining defendants' plea of res judicata as to each count of the case at bar (See App. 12, 14, 16). The Circuit Court, because the federal and state court records are devoid of supporting evidence, relies not on facts of record, but on its own suspicion for its finding that the District Court grounded its striking said state claims from my federal suit on Rule 12(f), Federal Rules of Civil Procedure.

> A court may not base its fact-findings on a suspicion which is contrary to the undisputed positive testimony. Hankerson v. Moody, 229 Va. 270, 329 S.E.2d 791 (1985).

Code of Virginia, § 8.01-680

B. The Federal Question Whether the Circuit Court Misapplied the Federal Rules of Civil Procedure Was Properly Brought Before the Supreme Court of Virginia.

Please note that the first time "redundancy" appears in the instant case is in the Circuit Court's opinion in support of its final judgment. Therefore, I had no opportunity to argue this issue in the lower court.

In "Assignments of Error" numbers 2, 6, 10, 15 and 19 (App. 43-46); and in "Questions for Review" number 6 (App. 47) of my Petition for Appeal, I properly brought before the Supreme Court of Virginia the federal question whether the Circuit Court misapplied Rule 12(f). And, I argue with specificity in Section III. of my Petition for Appeal that the Circuit Court erred in sustaining defendants' plea of res judicata on finding that the District Court struck the state claims from

my federal suit because of redundancy. (App. 55-57).

Because the Circuit Court's finding that the District Court apparently grounded its striking the state claims from my federal suit is not fairly supported by the record, the Supreme Court of Virginia's finding no reversible error in the Circuit Court's said application of Rule 12(f) is an insufficient independent or inadequate state ground, or otherwise inadequate ground.

> On writ of error to a state court, the Supreme Court can make findings of fact based on the evidence which the state courts omitted to make because, under the erroneous construction of the federal statute adopted by them, they considered such findings immaterial.

Merchants' Nat'l Bank v. Richmond, 256 U.S. 635, 635 (1921)

III. MANY ARE AFFECTED.

All litigants who file the same and/or related claims in both federal and state courts are affected. Litigants of all cases containing both federal and state claims are potentially affected.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT.

A. Federal Question of Due Process.

Giving them the benefit of the doubt in assuming that their unfairly denying me my day in court was unintentional; and that those courts did not treat my cases differently than any other case that has come before them, it appears that the Federal Fourth Circuit and the Supreme Court of Virginia need this Court's instruction on the law of preclusion, and how to

fairly prevent cases like mine from being relitigated.

If the Federal Fourth Circuit and the Supreme Court of Virginia treated my cases no differently than any other federal or state highest court would have treated them, all courts may need this Court's instruction via my case. For this Court to do so may result in a significant reduction in the dockets.

B. Federal Question of Misapplication of Federal Rules.

Denial of this Petition may give the appearance that arbitrarily applying the Federal Rules of Civil Procedure - even where, as here, said application is not fairly supported by facts of record - is a proven means by which state courts may evade review by this Court.

CONCLUSION

For the reasons given hereinabove, I, pro se Petitioner-plaintiff Clyde E. Clements, Jr. pray that the within Petition be granted and the judgment of the Supreme Court of Virginia be reversed and remanded for further proceedings consistent with the decisions of this Court in Merchants' Nat'l Bank v. Richmond, 256 U.S. 635 (1921) and Fiske v. Kansas, 274 U.S. 380 (1927).

January 28, 1998

Respectfully submitted,

Clyde E. Clements, Jr. pro se
Post Office Box 3391
Lynchburg, Virginia 24503
(804) 384-3711

APPENDIX

TABLE OF CONTENTS
Appendix to Petition

Appendix Page

Order,
Denying Petition for Rehearing,
Supreme Court of Virginia,
entered October 31, 1997 ..... App. 1

Order,
Refusing Petition for Appeal,
Supreme Court of Virginia,
entered September 9, 1997 ..... App. 2

Order,
Sustaining Defendants' Plea in Bar and Demurrer
and Denying Plaintiff's Motion for Leave to Amend,
Circuit Court of Campbell County,
Commonwealth of Virginia,
entered January 27, 1997 ..... App. 3

Opinion,
Circuit Court of Campbell County,
Commonwealth of Virginia,
entered January 27, 1997 ..... App. 5

Petition for Rehearing
filed September 22, 1997 ..... App. 18

Petition for Appeal
filed April 30, 1997 ..... App. 39

TABLE OF CONTENTS
Appendix to Petition
(Cont'd)

Appendix Page

Plaintiff's Memorandum of Law in Opposition to Defendants' Plea in Bar and Demurrer, filed September 17, 1996 ..... App. 71

Transcript, Hearing of Defendants' Plea in Bar and Demurrer, and of Plaintiff's Motion for Leave to Amend, Circuit Court of Campbell County, Commonwealth of Virginia, filed November 4, 1996 ..... App. 124

Errata Page, Evans & Company Court Reporters, filed December 17, 1996 ..... App. 138

Order, Denying Petitioner's Petition for Writ of Certiorari, The Supreme Court of the United States, (Filed by Defendants in Circuit Court at Tab 8 of Appendix in Support of Defendants' Plea in Bar and Demurrer), filed August 22, 1996 ..... App. 141

Letter, Rejecting Petitioner's Motion to Vacate, United States Court of Appeals for the Fourth Circuit, (Filed in Circuit Court by Defendants as attachment to Clinton Morse, counsel for Defendants letter to Circuit Court dated December 6, 1996, Record Page 446-474) filed December 6, 1996 ..... App. 142

TABLE OF CONTENTS
Appendix to Petition
(Cont'd)

Appendix Page

Appellant's Motion to Vacate Judgments, to United States Court of Appeals for the Fourth Circuit, (Filed in Circuit Court by Defendants as attachment to Clinton Morse, counsel for Defendants letter to Circuit Court dated December 6, 1996, Record Page 446-474) filed December 6, 1996 ..... App. 144

Memorandum of Points and Authorities in Support of Appellant's Motion to Vacate Judgments, to United States Court of Appeals for the Fourth Circuit, (Filed in Circuit Court by Defendants as attachment to Clinton Morse, counsel for Defendants letter to Circuit Court dated December 6, 1996, Record Page 446-474) filed December 6, 1996 ..... App. 147

Order, Granting Defendants' Motion for Reconsideration, United States District Court for the Western District of Virginia, Lynchburg Division, (Filed by Defendants in Circuit Court at Tab 4 of Appendix in Support of Defendants' Plea in Bar and Demurrer), filed August 22, 1996 ..... App. 150

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 31st day of October, 1997.

Clyde E. Clements, Jr., Appellant,

against Record No. 970879
Circuit Court No. CL 94000218-00

The Babcock & Wilcox Company, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 9th day of September, 1997 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste: s/ D B Beach
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 9th day of September, 1997.

Clyde E. Clements, Jr., Appellant,

against Record No. 970879
Circuit Court No. CL 94000218-00

The Babcock & Wilcox Company, et al., Appellees.

From the Circuit Court of Campbell County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: s/ Jennifer G. Earle
Deputy Clerk

BOOK 15 PAGE 473

VIRGINIA:

IN THE CIRCUIT COURT OF CAMPBELL COUNTY

CLYDE E. CLEMENTS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Law No. CL 94000218-00
	)	
THE BABCOCK & WILCOX COMPANY, ET. AL.	)	
	)	
	)	
Defendants.	)	

ORDER

On October 23, 1996, the parties presented oral argument on defendants' plea in bar and demurrer, and plaintiff's motion for leave to file a second amended motion for judgment. In addition to their arguments, both parties submitted memoranda of law and additional materials to the Court in support of their respective positions. Upon consideration thereof, and in accordance with the Court's opinion letter dated January 7, 1997, which is attached and incorporated in this Order, it is hereby ADJUDGED AND ORDERED that defendants' plea in bar and demurrer is sustained in its entirety. In addition, plaintiff's motion for leave to amend is denied. Further, the Court has considered the proposed Second Amended Motion for Judgment and concluded that it does not raise any new claims upon which any relief can be granted. Accordingly, this case is dismissed with

prejudice.

The clerk is directed to send a certified copy of this order to Mr. Clements and counsel for defendants.

Endorsement is dispensed with under Rule 1:13. Copies of this order have been mailed to Plaintiff and Defendants' counsel.

Entered this 27th day of January, 1997.

s/ J M Gamble
JUDGE

SEEN AND AGREED TO:
s/ Todd A. Leeson
Clinton S. Morse (VSB #22072)
Todd A. Leeson (VSB #30293)
Flippin, Densmore, Morse, Rutherford & Jessee
Post Office Drawer 1200
Roanoke, VA 24006
(540) 510-3000

Counsel for Defendants

SEEN AND OBJECTED TO FOR THE REASONS STATED IN ORAL ARGUMENT AND IN PLAINTIFF'S MOTIONS AND MEMORANDA TO THE COURT:

_____
Clyde E. Clements, Jr.
P.O. Box 3391
Lynchburg, VA 24503

Plaintiff pro se

TWENTY-FOURTH JUDICIAL CIRCUIT
OF VIRGINIA

J. MICHAEL GAMBLE, JUDGE
AMHERST COUNTY CIRCUIT COURT
P.O. BOX 1290
AMHERST, VA 24521

COMMONWEALTH OF VIRGINIA
CITIES OF LYNCHBURG AND BEDFORD
COUNTIES OF AMHERST, BEDFORD, CAMPBELL
AND NELSON

January 7, 1997

Mr. Clyde E. Clements, Jr.
P.O. Box 3391
Lynchburg, VA 24503

Clinton S. Morse, Esq.
Flippin, Densmore, Morse,
Rutherford & Jessee
P.O. Drawer 1200
Roanoke, VA 24006

IN RE: Clyde E. Clements, Jr. v. The Babcock & Wilcox Company, et al., CL 94000218-00, Circuit Court of Campbell County

Gentlemen:

I am writing this letter to rule on the Plea In Bar and the Demurrer of the defendants. I have reviewed thoroughly your arguments, the court file, and the information provided in the

Appendix that each of you have submitted. For purposes of this ruling, I will treat the Petition for Writ of Certiorari filed by Mr. Clements as part of the Appendix of the defendants. I will also treat the transcript of the telephonic argument before Judge Turk, together with the Brief of the Appellees to the United States Court of Appeals filed on behalf of the defendants, as part of the Appendix of the defendants. I have heard no objection by either party to the Court considering the matters in the Appendix of the plaintiff and the Appendix of the defendants in ruling on these motions. Accordingly, I will consider the matters that have been set forth in each Appendix.

The rulings that I make in this letter opinion address the matters raised in the Amended Motion for Judgment. I am aware that the plaintiff has filed a Second Amended Motion for Judgment. There has not, at this time, been any order entered which allows the filing of this Second Amended Motion for Judgment. Nonetheless, I have reviewed the Second Amended Motion for Judgment. As I have set forth below, I believe that this opinion will address any matters that are also raised in the Second Amended Motion for Judgment.

The Amended Motion for Judgment sets forth claims by Mr. Clements arising from his previous employment with The Babcock & Wilcox Company ("B&W"). He seeks recovery on the following grounds: intentional infliction of emotional distress, and conspiracy with intent of intentional infliction of emotional distress (Count One); defamation and conspiracy with intent of defamation (Count Two); tortious interference with existing and future economic relationships and tortious conspiracy with existing and future economic relationships (Count Three); and wilful discharge in violation of public policy (Count Four). Plaintiff seeks an award of compensatory and punitive damages in the amount of $18,000,000.00.

The defendants have filed a Plea in Bar on the basis of res judicata, collateral estoppel, and statute of limitations.

Additionally, the defendants have filed a Demurrer to each of the four counts of the plaintiff.

The allegations in the Motion for Judgment of the plaintiff are set forth in 126 numbered paragraphs plus attachments. Time does not allow the Court to fully set forth these allegations. However, for purposes of his opinion, it is helpful to give a brief summary of the allegations of the plaintiff and the procedural background to this case.

On September 19, 1994, the plaintiff filed his original Motion for Judgment in the Circuit Court of Campbell County. Almost two years prior to that the plaintiff had filed his Complaint in the United States District Court against the same defendants. The claims in federal court were eventually dismissed. The Amended Motion for Judgment filed in the Campbell County Circuit Court is against the identical defendants set forth in the Second Amended Complaint that the plaintiff filed in federal court.

Under the basic facts alleged by the plaintiff, he was previously employed as an engineer by B&W. He alleges that on or about August 18, 1989 a female employee, during the course of employment, unbuttoned several of the buttons on her blouse and brushed against him. The plaintiff complained to company officials that sexual harassment had occurred. The company concluded that there was no merit to his allegations. The plaintiff began a letter-writing campaign to government agencies regulating B&W, and to customers of B&W. Subsequent to a letter of August 17, 1992 to Department of Energy Secretary James Watkins, which alleged that the Department of Energy was acting as an accomplice to unlawful harassment, B&W terminated the employment of the plaintiff.

In 1990, B&W referred the plaintiff to the Employee Assistance of Central Virginia, Inc. for evaluation and counseling. The plaintiff alleges that this agency, and its employees, were part of the harassment and conspiracy against

him.

Counts Five, Six, Seven, Eight, and Nine of the federal court complaint alleged the same matters raised in the Amended Motion for Judgment filed in the Campbell County Circuit Court. By Order dated September 9, 1994, the United States District Court struck Counts Four through Nine of the Complaint. Unfortunately, in its order, the count did not clearly set forth the reasons for the striking of these counts. In its Order and Memorandum Opinion dated April 24, 1995, the United States District Court granted summary judgment on the remaining Counts One through Three. By per curium opinion the Fourth Circuit Court of Appeals affirmed the district court orders striking Counts Four through Nine, and granting summary judgment on Counts One through Three. The plaintiff then appealed to the United States Supreme Court. On April 15, 1996, the Petition for Writ of Certiorari to the United States Supreme Court was denied.

This Court will rule on the Plea In Bar and Demurrer on a count by count basis. Prior to ruling in this manner, however, this Court will review briefly the law of res judicata and collateral estoppel in Virginia.

The doctrine of res judicata bars relitigation of the same cause of action, or any part thereof, which could have been litigated between the parties and their privies. Bates v. Devers, 214 Va. 667, 670 (1974). Collateral estoppel is the preclusive effect impacting on a subsequent action based upon a collateral and different cause of action. The doctrine of collateral estoppel precludes the relitigation of an issue of fact decided by a prior final judgment in a subsequent suit involving a different cause of action. Angstadt v. Atlantic Mut. Ins. Co., 249 Va. 444, 446 (1995).

Under the doctrine of res judicata, a judgment in favor of a party bars relitigation of the same cause of action, or any part thereof, which could have been litigated between the

parties and their privies. Brown v. Haley, 233 Va. 210, 215 (1987), Flora, Flora and Montague v. Saunders, 235 Va. 306, 310 (1988).

The doctrines of res judicata and collateral estoppel apply where there has been prior litigation in federal court. For instance, dismissal of an action with prejudice in federal court can result in claim preclusion in state court of a matter that was never litigated because the matter could have been advanced in the earlier federal suit. Nottingham v. Weld, 237 Va. 416, 420 (1989).

I will now turn to the Plea and Demurrer which has been raised by the defendants. I will address these questions on a count by count basis in this opinion.

COUNT ONE

Count One of the Amended Motion for Judgment sets forth the plaintiff's claim based upon intentional infliction of the emotional distress and conspiracy with intent to inflict emotional distress. The defendants assert that this count is barred under the doctrine of res judicata. This Court agrees. The United States District Court Judge, by order of September 9, 1994, struck this count (labeled Count Five) from the Complaint. Under Rule 12(f) of the Federal Rules of Civil Procedure, the court may order stricken from a pleading "....any redundant, immaterial, impertinent, or scandalous matter." It is clear from reviewing the pleadings of the Complaint in federal court, that the allegations supporting that case are the same allegations supporting the instant case. Although the United States District Court judge did not clearly state, it is apparent that Count Five of the Complaint was merely redundant of the federal causes of action that were pled. The Fourth Circuit Court of Appeals and the United States Supreme Court agreed. Therefore, this was a final judgment on the

merits in the same cause of action between the same parties. Thus, the plea of res judicata is sustained.

Additionally, the defendants' plea of collateral estoppel is also sustained. In its Memorandum Opinion granting summary judgment to Count Two of the Second Amended Complaint, the United States District Court ruled that the same facts and allegations alleged to support the instant case were not sufficient to support the retaliatory discharge allegations of Count Two. In granting summary judgment on the facts alleged in support of Count Two, the district court said that because the "plaintiff has not presented a shred of evidence other than allegations, to meet his burden that B&W would not have terminated him but for his claim with the EEOC." Further, the district court said the "plaintiff has presented no evidence, other than the fact of his termination, to show retaliatory intent, he has failed to make out a prima facie case of discrimination." Additionally, the district court held that "Clements has not presented a scintilla of evidence to show to B&W's stated reasons for his discharge were merely a pretext." It is obvious that if the plaintiff in the instant case could not allege sufficient facts to demonstrate that B&W terminated him in retaliation for his claims with the EEOC, there are not sufficient allegations to support a claim for intentional infliction of emotional distress. There must, in the least, be outrageous conduct by B&W. The district court concluded this issue. Thus, collateral estoppel applies because this same factual issue was litigated between the parties in the prior proceeding and a final judgment was entered against the plaintiff.

Next, the defendants maintain that Count One is barred by the statute of limitations. Again, this court agrees. It is the law of Virginia that the statute of limitations begins to run from the date of injury. §8.01-230, Code of Va. (1950), as amended. The defendants are correct in their assertion that the claim of

the plaintiff for infliction of injury to him arises as early as 1990. He certainly was complaining of the failure of the B&W management to take action on the alleged sexual harassment as early as 1990. He was even writing letters complaining of this conduct at that time. Thus, even using the two-year statute of limitations for personal injuries under §.01-243(A) of the Code of Virginia, the plaintiff's action for emotional distress has not been filed within the two-year statute of limitations. Count One is therefore time-barred.

Last, the defendants assert that the plaintiff's claim for intentional infliction of emotional distress fails to state a claim upon which relief can be granted. Under the criteria set forth in Womack v. Eldridge, 215 Va. 338 (1984), four elements must be shown in order for an action of intentional infliction of emotional distress to lie. It must be shown that the conduct of the wrongdoer was intentional or reckless, that the conduct was outrageous and intolerable in that it offends generally accepted standards of decency and morality, that there was a causal connection between the conduct and the emotional distress, and that the emotional distress was severe. 215 Va. at 342.

The allegations in the Motion for Judgment simply do not support the requirement of outrageous and intolerable conduct. At best, the allegations show that B&W did not agree that the plaintiff had been sexually harassed. Also, B&W took the rational step of referring the plaintiff to the Employee Assistance Program. There is nothing in this conduct that is outrageous or intolerable. The only allegations of outrageous and intolerable conduct are conclusions set forth in the pleadings. Conclusions are not legally sufficient. Thus, the Demurrer is sustained.

As a result of sustaining the pleas and the Demurrer, Count One is dismissed.

COUNT TWO

In Count Two the plaintiff alleges defamation and conspiracy with intent of defamation. The defendant files the same pleas and a Demurrer with respect to this count.

This Court agrees that Count Two is barred under the doctrine of res judicata. Counts Six and Count Seven of the Complaint in the United States District Court alleged defamation and conspiracy with intent of defamation. Counts Six and Seven were struck from the federal complaint. Again, upon a review of the allegations in the federal complaint and the allegations in the instant Motion for Judgment, it is clear that the United States District Court believed that the defamation and conspiracy claim was merely redundant and struck the case under Rule 12(f) of the Federal Rules of Civil Procedures.

The federal complaint alleged retaliatory discharge under Count Two. This was dismissed on summary judgment. As outlined in the discussion of Count One above, the United States District Court held that the defendants did not engage in any improper conduct towards the plaintiff. Thus, striking Counts Six and Seven, alleging defamation and conspiracy of defamation, was a dismissal on the merits in favor of the defendants. Accordingly, the plea of res judicata is sustained.

Additionally, the plea of collateral estoppel is sustained. The same facts used to support the allegations of retaliatory discharge in Count Two of the federal complaint, which were dismissed on a motion for summary judgment, were also alleged to support Count Two of the Motion for Judgment. The United States District Court judge found in his Memorandum Opinion that the defendants had not engaged in any improper or retaliatory conduct. In order to support the defamation count in the Motion for Judgment, the plaintiff would have to allege that the defendants stated or published false statement about his fitness or job performance. The United States District Court,

under the same facts, did not find that the defendants had engaged in any improper conduct. Thus, this issue of fact was actually litigated to a final judgment in the United States District Court and the plea of collateral estoppel is sustained.

The defendants also maintain that the defamation claim of the plaintiff is time-barred by the statute of limitations. Defamation is governed by the one-year statute of limitations under §8.01-248 of the Code of Virginia, as amended. In the instant case, the acts of defamation allegedly occurred in 1990. The plaintiff did not file his state lawsuit until 1994. Therefore, his claim is barred by the statute of limitations.

The defendants also maintain that the defamation claim fails to state a case upon which relief can be granted. In the instant case, the plaintiff simply has not pled specifically any falsehood that was stated or published about him from which he suffered any damage. Additionally, statements by company managers about an employee upon dismissal are privileged statements. Brown v. Norfolk & W.R. Co., 100 Va. 619, 624 (1902).

COUNT THREE

In Count Three of the Motion for Judgment the plaintiff alleges tortious interference with existing economic relationships and conspiracy to interfere with existing economic relationships.

I will start first with the Demurrer stating that the plaintiff fails to state a claim from which relief can be granted in Count Three. This Demurrer is sustained. The plaintiff simply does not allege a cause of action in Count Three.

The plaintiff was an at-will employee of B&W. In order to allege tortious interference with the contract the plaintiff must allege facts which establish a valid contract, knowledge on the part of the interferer, intentional interference causing a

termination of the contract, and damage resulting to the plaintiff. Duggin v. Adams, 234 Va. 221 (1987). In the instant case, the plaintiff was an at-will employee who could be terminated at any time. Thus, it was not possible to interfere with his employment contract because his employment contract could be terminated at any time. Thus, there was not a contract which could be interfered with because there was no contract for any specific period of time in effect. Further, there is no allegation in the Motion for Judgment which supports the requirement that the at-will employment of the plaintiff was terminated by any improper means as required to establish a case of tortious interference under an at-will contract. Duggin v. Adams, 234 Va. 221, 226-227 (1987).

Also, Count Three is barred by res judicata. Count Eight of the Complaint filed in the United States District Court alleged tortious interference. This was struck by the district court judge. It is obviously redundant of the other pleadings for relief in the United States District Court. Therefore, the order striking Count Eight was a decision on the merits which activates the res judicata bar to Count Three of the Motion for Judgment.

Likewise, this count must be dismissed pursuant to the doctrine of collateral estoppel. The United States District Court granted summary judgment to the retaliatory discharge claim in Count Two of the Complaint. In his Memorandum Opinion, as discussed above, the United States District Court judge did not find any improper conduct by the defendants. The same facts were alleged in the complaint filed in the United States District Court as were alleged in the Motion for Judgment in the instant case. The United States District Court decided the issue of improper conduct by the defendants against the plaintiff. Thus, collateral estoppel prevents the plaintiff from raising this factual issue again.

Count Three is also time-barred pursuant to the one-

year statute of limitations under §8.01-248 of the Code of Virginia, as amended. The acts giving rise to tortious interference occurred in 1989 and 1990. This case was filed on September 19, 1994. Therefore, it is not within the statute of limitations.

Accordingly, Count Three is dismissed.

COUNT FOUR

In Count Four the plaintiff alleges wrongful discharge in violation of public policy. I will address the Demurrer of the defendants first. The defendants maintain in their Demurrer that Count Four fails to state a claim upon which relief can be granted.

As noted previously, Virginia recognizes at-will contracts in employment relationships. This was affirmed by the Virginia Supreme Court as recently as Lawrence Chrysler Plymouth Corp. v. Brooks, 251 Va. 94, 97, 465 S.E.2d 806 (1996). In Brooks, the Court reaffirmed that an at-will employee may have a cause of action for discharge in violation of public policy only if the employee can identify s specific Virginia statute the employer violated. 251 Va. at 97-98. The plaintiff in the instant case has alleged no Virginia statute that has been violated by his discharge. The plaintiff was an at-will employee. Thus, the Demurrer is sustained and Count Four is dismissed.

The defendants also filed a plea that Count Four is barred by the statute of limitations. Wrongful termination cases are governed by the one-year statute of limitations set forth in §8.01-248 of the Code of Virginia. Purcell v. Tidewater Construction Corp., 250 Va. 93, 94 (1995). The plaintiff was terminated from his employment on September 21, 1992. He filed his causes of action in state court on September 19, 1994. His case is time-barred.

Additionally, the doctrine of res judicata applies to Count Four. In Count Nine of his complaint filed in United States District Court, the plaintiff alleged wrongful termination. This count was stricken by the district court. Upon a review of the pleadings it is apparent that this count was redundant of the federal claims. The United States District Court granted summary judgment to Count Two, alleging retaliatory discharge, in the federal complaint. The court found that the defendants had not engaged in any wrongful conduct concerning the employment of the defendant. Thus, the wrongful termination issue had been decided on the merits in the United States District Court.

Likewise, collateral estoppel applies. The United States District Court judge did not find that the defendants had engaged in any improper conduct with respect to the employment of the plaintiff when it granted summary judgment to Count Two of the Complaint. Thus, the facts supporting Count Four of the Motion for Judgment had been litigated adversely to the plaintiff in the federal court action. The plea of collateral estoppel is therefore sustained.

For the reasons set forth herein, Count Four is dismissed.

Based on all of the above rulings, the Motion for Judgment of the plaintiff is deficient and must be dismissed in its entirety.

The Second Amended Motion for Judgment is a restatement of the same allegations as the Amended Motion for Judgment, except it adds a count for invasion of privacy and civil conspiracy. There are no causes of action for invasion of privacy and civil conspiracy under Virginia common law. Thus, there are no new matters to act on in the Second Amended Motion for Judgment.

I ask that Mr. Morse draw the Order which implements the decision set forth in this opinion. I ask that this Order be

submitted to me for entry by January 31, 1997.

Sincerely yours,
s/ J M Gamble
J. Michael Gamble, Judge

JMG/kst
cc: court file

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
SEP 22 1997
RICHMOND, VIRGINIA

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 970879

CLYDE E. CLEMENTS, JR,
Plaintiff/Appellant,

v.

THE BABCOCK & WILCOX COMPANY, et al.,
Defendants/Appellees.

PETITION OF APPELLANT FOR REHEARING

Clyde E. Clements, Jr.
3024 Rivermont Avenue, Apartment 6
Post Office Box 3391
Lynchburg, Virginia 24503
(804) 384-3711

Pro Se Plaintiff/Appellant

SUBJECT INDEX

TABLE OF CITATIONS iii

CODE OF VIRGINIA: iii

RULES OF VIRGINIA COURT: iii

RULES OF FEDERAL COURT: iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 5

ARGUMENT 7

CONCLUSION 15

TABLE OF CITATIONS

CASES:

Bailey v. Scott-Gallaher, Inc., 253 Va. 121, 480 S.E.2d 502 (Va. 1997) 14, 15

Hankerson v. Moody, 229 Va. 270, 329 S.E.2d 791 (1985) 11

Lavinder v. Commonwealth, 12 Va. App. 1003, 407 S.E.2d 910 (1991) 9

Lawrence Chrysler Plymouth Corp. v. Brooks, 251 Va. 94, 465 S.E.2d 806 (1996) 14

Pace v. Richmond, 231 Va. 216, 343 S.E.2d 59 (1986) ... 8

CODE OF VIRGINIA:

§ 8.01-678 ..... 8, 9

§ 8.01-680 ..... 8, 10, 11

Virginia Human Rights Act 14, 15

RULES OF VIRGINIA COURT:

Rule 5:20 1

RULES OF FEDERAL COURT:

Rule 12(f) 12

U.S. Court of Appeals for the Fourth Circuit, Local Rule 40(d) 5

IN THE

SUPREME COURT OF VIRGINIA
AT RICHMOND

CLYDE E. CLEMENTS, JR,
Plaintiff/Appellant,

v.

THE BABCOCK & WILCOX COMPANY, et al.,
Defendants/Appellees

PETITION FOR APPEAL

On Petition for Appeal from the Circuit Court of the County of Campbell, Honorable J. Samuel Johnston, Jr., Judge. Honorable J. Michael Gamble, Judge of the County of Amherst presided over the case in caption.

I do not waive any points of my Petition for Appeal. Pursuant to Rule 5:20 of the Rules of the Supreme Court of Virginia, I respectfully petition this Court for rehearing as follows:

STATEMENT OF THE CASE

This is an employment discrimination case, which includes the claims of intentional infliction of emotional

distress; defamation; tortious interference with economic relationship; wrongful termination in violation of public policy; invasion of privacy; and civil (common law) conspiracy. At the time of the events giving rise to this litigation, I, pro se plaintiff/appellant Clyde E. Clements, Jr., was employed by the Naval Nuclear Fuel Division ("NNFD") of defendant The Babcock & Wilcox Company ("B&W") as an engineer.

While employed by B&W I filed a sexual harassment complaint with the Equal Employment Opportunity Commission ("EEOC"). The EEOC determined that the incident I complained of occurred, but that case precedent has established that a one time incident is insufficient to establish that I was sexually harassed.

B&W fired me without notice on September 21, 1992. I then filed a retaliatory discharge complaint with the EEOC. The EEOC subsequently determined that B&W's discharge documents ("B&W discharge document") revealed that I was fired in part for my complaining of harassment, discrimination and retaliation; that the record supports my allegation that B&W unlawfully fired me in part for opposing practices made unlawful by Title VII; and that there also appeared to be a lawful reason for B&W's firing me ("EEOC mixed motives determination").

On October 30, 1992 I filed my original federal employment discrimination complaint with the U.S. District Court for the Western District of Virginia, Lynchburg Division ("District Court"); on February 5, 1993 the District Court granted my motion for leave to file my Amended Complaint, of which B&W, Alvis, Conner and Tetrault were the only defendants ; and on June 28, 1994 the District Court granted my motion for leave to file my Second Amended Complaint, which is against the same defendants as those of my Motion for Judgment ("M.J."), Amended Motion for Judgment ("Am.M.J.") and proposed Second Amended Motion for

Judgment ("2d.Am.M.J.") of instant case. On September 9, 1994, in response to defendants' Motion for Reconsideration, the District Court struck my intentional infliction of emotional distress, defamation, tortious interference with economic relationship, wrongful termination and civil conspiracy claims, as well as all defendants except B&W, Alvis, Conner and Tetrault from my Second Amended Complaint, without setting forth its reason(s) for doing so.

This civil action was brought by me when, on September 19, 1994 I filed my original Motion for Judgment in the Circuit Court of Campbell County ("Court below" or "Circuit Court") under claims arising under the Virginia Human Rights Act, and under claims arising under the common law of the Commonwealth of Virginia. The defendants and causes of action were the same as those included in my Second Amended Complaint I had filed in District Court.

The District Court quashed my subpoenas I had prepared for discovering facts relating to the disappearance of confidential documents from my confidential file maintained by defendant Employee Assistance of Central Virginia, Inc.; denied my motion for extension of time to complete discovery; and on March 7, 1995 entered its Order granting defendants' motion to stay discovery that was filed on the same day that I had filed my motion to compel B&W to answer my discovery requests, without a hearing of either motion.

Among the documents on record in the District Court before the District Court heard defendants' motions for summary judgment are: the B&W discharge document, *supra*; EEOC mixed motives determination, *supra*; excerpts from the transcript of the deposition of defendant James A. Conner, then and now B&W, NNFD's Vice President and General Manager which show that Conner responded "No" to my question, "Do you have any reason to believe that I was a disloyal employee?"

The District Court's hearing of defendants' motion for

summary judgment took place on March 9, 1995; and on April 24, 1995 the District Court granted B&W's pre-trial motion for summary judgment and entered a final judgment in favor of all defendants. The District Court's accompanying unpublished memorandum opinion included its finding that the record contained no evidence in support of my retaliatory discharge claim; and that B&W had a legitimate nondiscriminatory reason for firing me - namely, disloyalty.

I then appealed to the U.S. Court of Appeals for the Fourth Circuit ("Appeals Court"). The Appeals Court subsequently entered judgment for the defendants, affirming on the reasoning of the District Court in an unpublished unsigned per curium opinion. My Petition for Rehearing was subsequently denied.

I then filed my Petition for a Writ of Certiorari with the U.S. Supreme Court, which was subsequently denied. My Petition for Rehearing was also denied.

On June 27, 1996 the District Court denied my motion to vacate judgments; and advised me that any further pursuit of my case in the District Court, or with the Appeals Court could result in Rule 11 sanctions.

Defendants' plea in bar and demurrer was heard on October 23, 1996 by the Circuit Court of Amherst County ("Court below" or "Circuit Court"). The Court below subsequently sustained defendants' plea in bar and demurrer in its entirety; and denied my motion for leave to amend my Amended Motion for Judgment, concluding that my proposed 2d.Am.M.J. is a restatement of my Am.M.J. except that the 2d.Am.M.J. adds Count Five, Invasion of Privacy and Count Six, Civil Conspiracy.

On December 9, 1996 the Appeals Court filed its order dismissing my Motion to Vacate Judgments on grounds of fraud on the court; and grounded its decision on its Local Rule 40(d), which does not allow the Appeals Court to entertain a

request for relief after denial of rehearing. Finally, on April 14, 1997 the U.S. Supreme Court denied my Petition for a Writ of Certiorari, in which I challenge the constitutionality of the Appeals Court's Local Rule 40(d).

I timely filed my Notice of Appeal, the transcript of the lower Court's hearing of defendants' plea in bar and demurrer, my motion for leave to amend; and I timely filed my Petition for Appeal.

On August 28, 1997 I presented oral argument in support of my Petition for Appeal, before Justices Keenan, Compton and Poff. Among other things, I presented undisputed facts of record in support of my key assertion that the doctrines of res judicata and collateral estoppel do not apply to instant case because the federal courts denied me an opportunity to fully and fairly litigate; and I physically showed the Justices that my proposed 2d.Am.M.J. contains exhibits and other alleged facts that are not included in my Am.M.J. On September 9, 1997, this Court entered its Order denying my Petition for Appeal, in which Justices Keenan, Compton and Poff state that they found no reversible error in the lower Court's judgment.

STATEMENT OF FACTS

On record is the original Plaintiff's Appendix in Opposition to Defendants' Plea in Bar and Demurrer, which contains certified true copies of the following documents from the record of my case in the federal District Court, that serve as evidence in support of my claims:

EEOC Letter of Determination of July 30, 1992, that states that the EEOC found that the one time incident I complained of as sexual harassment occurred; B&W's Disciplinary Report, in which B&W states that I was fired for complaining of harassment, discrimination and retaliation; EEOC Letter of Determination of February 23, 1994, that documents that, in essence, the EEOC found that aforementioned B&W's

Disciplinary Report contains proof of prima facie retaliatory discharge; the January 4, 1995 John Geier, counsel for defendants letter in which the defendants admit that a document I requested production of through discovery was no longer in my confidential file maintained by defendant Employee Assistance of Central Virginia, Inc. ("EACV"); transcript of defendant Conner's deposition, during which he responded "No" to my question, "Do you have any reason to believe that I was a disloyal employee?"; transcript of District Court's March 9, 1995 motions hearing; and the District Court docket sheets.

The documents above prove that, before defendants' motion for summary judgment was granted, the record of the District Court contained proof of prima facie retaliatory discharge; and a genuine issue of material fact regarding B&W's proffered reason for firing me. At the very least, my retaliatory discharge claim should have gone to trial -- but it did not.

The documents above also show that the District Court denied me a full and fair opportunity to conduct my discovery. For example, after approximately 45 days of waiting for B&W to answer my second set of discovery requests, I filed a motion to compel, in which I specifically requested that it be heard during the hearing of motions, which had already been set. On the same day, B&W filed its motion to stay discovery. Without a hearing of either motion, the District Court granted B&W's motion to stay discovery. Succinctly stated, the District Court enabled the defendants to make use of obstruction of justice as a defense tactic.

In its Memorandum Opinion relating to its granting defendants' motion for summary judgment, the District Court, in essence, stated that the record contained no evidence in support of my retaliatory discharge claim. In sustaining defendants' plea in bar, honorable Court below relies in part on

this erroneous finding of the District Court, as shown by its letter opinion.

ARGUMENT

Justice Keenan, Justice Compton and Senior Justice Poff erred in finding that there is no reversible error in the judgment of the Court below, for the following reasons:

I. The Judgment of the Court Below Is Grounded on Prejudicial Error.

A. The Court Below Disregarded Evidence of Record That Could Have Resulted in a Different Outcome Had it Not Been Disregarded.

> * * * The trier of fact must determine the weight of the testimony and the credibility of the witnesses, but it "may not arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with the facts of record." * * *

Hankerson v. Moody, 329 S.E.2d 791 (Va. 1991) at 794.

1. The Court below Disregarded Evidence of Record in Support of My Key Assertion That the Federal Courts Denied Me an Opportunity to Fully and Fairly Litigate.

In my Petition for Appeal at 15, 16 and 17; and during my oral argument before Justices Keenan, Compton and Poff on August 28, 1997 in support of my Petition for Appeal, I alerted this Court to the fact that the Court below disregarded the following evidence of record in support of my key assertion that the doctrines of res judicata and collateral estoppel do not apply because the federal courts denied me an opportunity to fully and fairly litigate: a) B&W's Disciplinary Report (See Plaintiff's Appendix in Opposition to Defendants' Plea in Bar

and Demurrer, Exhibit 2 ("P.App., Ex.2")); b) EEOC Determination dated February 23, 1994 (See P.App., Ex.3); c) Jon Geier, counsel for defendants letter dated January 4, 1995 (See P.App., Ex.4); d) Transcript of defendant Conner's deposition (See P.App., Ex.5); e) Transcript of U.S. District Court motions hearing (See P.App., Ex.6), and; e) U.S. District Court docket sheets (See P.App., Ex.9). Said documents are uncontradicted evidence of an unimpeached witness (myself) which is "not inherently incredible and not inconsistent with the facts of record." Please note that the originals of said documents on record are U.S. District Court certified true copies.

Said evidence proves that presiding U.S. District Judge Turk: a) quashed my subpoenas I had prepared for discovering facts relating to defendants' removal of documents from my confidential record maintained by defendant Employee Assistance of Central Virginia, Inc. In their response to my subpoena served on EACV, defendants admitted to removing said documents from said record; b) without a hearing, granted defendants' motion to stay discovery that was filed on the same day I filed my motion to compel defendants to answer my discovery requests that they were refusing to answer. In my motion to compel, I specifically requested that the motion be heard during the hearing of motions, which had already been set; c) denied me a hearing of my motion to compel, and; d) then compounded his error by dismissing my retaliatory discharge claim on the ground that I had submitted no evidence in support of said claim, when in fact the record contained aforementioned B&W Disciplinary Report, in which B&W admits to having fired me for complaining of harassment, discrimination and retaliation. The record also contained said EEOC Determination that documents the EEOC's finding of "mixed motives" regarding my retaliatory discharge claim.

The Code of Virginia, §§ 8.01-678 and 8.01-680

provide guidelines for determining whether error by the court is harmless:

Justice Poff, in Pace v. Richmond, 231 Va. 216, 343 S.E.2d 59 (Va. 1986), which is cited in Code § 8.01-678, states at 65, "We will not reverse a judgment for error in excluding evidence 'where it appears from the record that the error . . . could not and did not affect the verdict.'" The contrapositive of this statement is: Where it appears from the record that the error could and did affect the verdict, we will reverse a judgment for error in excluding evidence.

Justice Keenan participated in the hearing and decision of Lavinder v. Com., 12 Va. App. 1003, 407 S.E.2d 910 (Va.App. 1991), in which the Court of Appeals of Virginia states at 911:

> * * * An error does not affect a verdict if a reviewing court can conclude, without usurping the jury's fact finding function, that, had the error not occurred, the verdict would have been the same.

The Lavinder Court goes on to state at 911: "Code § 8.01-678 applies to both civil and criminal cases." Lavinder is cited in the Code § 8.01-678.

Clearly, the lower Court's error of disregarding said evidence in support of my key assertion that the doctrines of res judicata and collateral estoppel do not apply because I was denied an opportunity to fully and fairly litigate, does not plainly appear that it could not have affected the lower Court's judgment. If the Court below had found from abovementioned evidence of record in support of my key assertion that res judicata and collateral estoppel do not apply to instant case, defendants' plea would not have been sustained. Therefore, the lower Court's arbitrarily disregarding said evidence of record is prejudicial error. There being prejudicial error in the lower

Court's judgment, Justices Keenan, Compton and Poff's refusal of my Petition for Appeal on the ground that there is no reversible error in the lower Court's judgment is in error.

2. The Lower Court Disregarded Those Facts Alleged in My Second Amended Motion for Judgment That Are Not Alleged in My Amended Motion for Judgment.

Judge Gamble states on Page 8 of his letter opinion that my 2d.Am.M.J. is a restatement of the same allegations as my Am.M.J., except it adds a count for invasion of privacy and civil conspiracy. As shown on pages 22 and 23 of my Petition for Appeal, the exhibits attached to my proposed 2d.Am.M.J. that relate to my defamation claim are not attached to my Am.M.J. Justices Keenan, Compton and Poff will recall that I physically showed them during my oral argument on August 28, 1997, that my 2d.Am.M.J. contains exhibits relating to my defamation claim that are not attached to my Am.M.J. Further, I allege facts relating to each of the causes of action in my 2d.Am.M.J. that are not included in the Am.M.J.

The lower Court's finding that the 2d.Am.M.J. is a restatement of my Am.M.J. is prejudicial error for the following reasons: a) The lower Court relied on its error of finding that my 2d.Am.M.J. is a restatement of my Am.M.J. in denying my motion for leave to amend, and; b) by the lower Court's erroneously finding that my 2d.Am.M.J. is a restatement, *the lower Court admits that it disregarded the alleged facts that appear only in my 2d.Am.M.J.*

> * * * when a case is decided by a court * * * and a party objects to the decision on the ground that it is contrary to the evidence, the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it.

Code of Virginia, § 8.01-680

The lower Court's finding that my 2d.Am.M.J. is a restatement of my Am.M.J. is plainly wrong. Said plainly wrong finding is not harmless error and is prejudicial because it is the ground on which the lower Court denied my motion for leave to amend. Further, by the lower Court's in substance admitting that it disregarded those alleged facts appearing in only my proposed 2d.Am.M.J., the lower Court also admits that its sustaining of defendants' demurrer is not grounded on determination of all the facts alleged in 2d.Am.M.J. (The lower Court states in its letter opinion at 1: "* * * I believe that this opinion will address any matters that are also raised in the Second Amended Motion for Judgment.").

Therefore, the lower Court's denying my motion for leave to amend - and the lower Court's sustaining defendants' demurrer - are not harmless error and are prejudicial, since, if said alleged facts had not been disregarded, the judgment would not have been the same. There being prejudicial error in the lower court's judgment, Justice Keenan, Compton and Poff's finding of no reversible error is in error.

3. The Court below Disregarded My Argument, Together with All Supporting Evidence of Record, That All My Claims Are Timely.

The Court below disregarded my argument that all my claims are made timely by the tolling effect of defendants' fraudulent concealment, continuing common law conspiracy and obstruction of justice. Please see my Petition for Appeal at 23, 24. The lower Court's finding that my claims are time-barred is therefore prejudicial error since, had it not disregarded my argument that all my claims are made timely by the tolling effect of defendants' fraudulent concealment, continuing common law conspiracy and obstruction of justice, the lower Court would not have held that my claims are time-barred. There being prejudicial error in the lower Court's judgment,

Justices Keenan, Compton and Poff's finding of no reversible error is in error.

B. The Court Below Grounded Its Sustaining of Defendants' Plea of Res Judicata, and Its Disregarding My Allegation Common Law Conspiracy as to All Counts, on Suspicion.

> A court may not base its fact-findings on a suspicion which is contrary to the undisputed positive testimony. Hankerson v. Moody, 229 Va. 270, 329 S.E.2d 791 (1985).

Code of Virginia, § 8.01-680

Even though I stated on the record, with no objections from defendants, that Judge Turk gave no reason for his striking my state tort claims from my federal suit (See "Transcript of Proceedings" of the October 23, 1996 hearing in the Court below, at 23, L 9 &10), The lower Court grounded its sustaining of defendants' plea of res judicata - and its disregarding my allegation of common law conspiracy - on its suspicion that Judge Turk grounded his striking my state tort claims on federal Rule 12(f) redundancy. See the lower Court's letter opinion at 4 through 8. The record below contains no evidence indicating that the District Court grounded its striking my state tort claims on redundancy. See Petition for Appeal at 14, 15.

The lower Court's grounding its sustaining of defendants' plea of res judicata, and its disregarding of my allegation of common law conspiracy, on its suspicion that the U.S. District Court struck my state torts because of federal Rule 12(f) redundancy is not harmless, and is prejudicial error because, had it not done so, the judgment would not be the same as it is. There being prejudicial error, Justice Keenan, Compton and Poff's finding of no reversible error in the lower

Court's judgment is in error.

C. The Court Below Grounded Its Sustaining of Defendants' Plea of Collateral Estoppel on the Prejudicial Error of the U.S. District Court.

Judge Turk, by his ruling that I had presented no evidence in support of my retaliatory discharge claim, disregarded defendant B&W's Disciplinary Report, the transcript of defendant Conner's deposition and the EEOC Determination dated February 23, 1994. See P.App., Ex.2, 3, and 5. See also Exhibits 6 at 30, 33 and 34. This uncontradicted evidence was presented to the District Court - and to the Court below - by an unimpeached witness (myself). Further, this evidence is not inherently incredible and not inconsistent with facts of record.

The Court below states in his letter opinion at 4:

> It is obvious that if the plaintiff in the instant case could not allege sufficient facts to demonstrate that B&W terminated him in retaliation for his claims with the EEOC, there are not sufficient allegations to support a claim for intentional infliction of emotional distress. * * * Thus, collateral estoppel applies because this same factual issue was litigated between the parties in the prior proceeding and a final judgment was entered against the plaintiff.

The lower Court in substance grounds its sustaining of defendants' plea of collateral estoppel as to each of my causes of action, with the exception of invasion of privacy and civil conspiracy, on the same finding.

The Court below states on Page 5 of its letter opinion:

> * * * the United States District Court held that the defendants did not engage in any improper conduct

> towards the plaintiff. Thus, striking Counts Six and Seven, alleging defamation and conspiracy of defamation, was a dismissal on the merits in favor of the defendants. Accordingly, the plea of res judicata is sustained.

Clearly, the Court below grounds its sustaining of defendants' plea of res judicata on the U.S. District Court's finding that defendants did not engage in any improper conduct towards me. However, the lower Court's record contains a U.S. District Court certified true copy of B&W's Disciplinary Report signed and dated on September 21, 1992, in which B&W admits that it fired me in retaliation for complaining of harassment, discrimination and retaliation. Further, the lower Court's record contains a U.S. District Court certified true copy of the EEOC Determination dated February 23, 1994, in which the EEOC states:

> Charging Party's discharge documents reveal that he was discharged in part for his accusations that management harassed, discriminated and retaliated against him.

Said Disciplinary Report and EEOC Determination are uncontradicted evidence presented by an unimpeached witness (myself); and this evidence is not inherently incredible and not inconsistent with facts of record. Further, this evidence -- together with defendant Conner's deposition, which contradicts B&W's key assertion that I was fired for disloyalty -- would have required at least my retaliatory discharge claim to proceed to trial, if Judge Turk had not disregarded it. Judge Turk's disregarding this evidence is, therefore, prejudicial error.

Because the Court below grounded its sustaining defendants' plea of res judicata on its finding that the District

Court held that the defendants did not engage in any improper conduct towards me, which is itself grounded on prejudicial error, the lower Court's sustaining defendants' plea of res judicata must be reversed. The lower Court also grounded its sustaining of defendants' plea on its finding that defendants of instant case are the same as those of the U.S. District Court judgment. This finding is plain error and is, therefore, also prejudicial.

II. Justices Keenan, Compton and Poff Erred in Disregarding My Citing of Bailey.

The Court below states in its letter opinion at 7: "The plaintiff in the instant case has alleged no Virginia statute that has been violated by his discharge.", even though I cite the Virginia Human Rights Act in ¶ 125 of my Am.M.J., and in ¶¶ 2 and 259 of my proposed 2d.Am.M.J. In Count Four of both my Am.M.J. and my proposed 2d.Am.M.J. I allege wrongful termination in violation of public policy; specifically, I allege in ¶ 125 and elsewhere in my Am.M.J., and in ¶¶ 23, 259 and elsewhere in my proposed 2d.Am.M.J. that B&W fired me in retaliation for complaining of sexual harassment, discrimination and retaliation.

Said letter opinion is dated January 7, 1997. Three (3) days later, on January 10, 1997 this Court decided Bailey v. Scott-Gallaher, Inc., 253 Va. 121, 480 S.E.2d 502 (Va. 1997), in which this Court states:

> * * * we noted in Lockhart that while the cause of action for wrongful termination based on gender discrimination arose independently from the Virginia Human Rights Act, the public policy articulation in that Act satisfies our requirement in Lawrence Chrysler Plymouth Corp. for identifying a statutory embodiment of the public policy of the Commonwealth.

Bailey v. Scott-Gallaher, Inc., 253 Va. 121, 480 S.E.2d 502 (Va. 1997)

Therefore, because Bailey removes any doubt as to whether my citing the Virginia Human Rights Act satisfies this Court's requirement "for identifying a statutory embodiment of the public policy of the Commonwealth", the lower Court's grounding its sustaining and dismissing my wrongful termination in violation of public policy claim on its finding that I alleged no Virginia statute that has been violated by my discharge, is reversible error.

I brought all these facts before this Court in my Petition for Appeal at 21 and 22. Justices Keenan, Compton and Poff will recall that I cited Bailey, and discussed its effect on instant case, during my oral argument before them on August 28, 1997. Justices Keenan, Compton and Poff's finding no reversible error in the lower Court's holding that I had alleged no Virginia statute that has been violated by my discharge, even though said holding is contradicted by Bailey, *supra.*, is in error.

CONCLUSION

For the reasons stated above, I, pro se plaintiff/appellant, Clyde E. Clements, Jr., respectfully request that this Court accept this Petition for Rehearing, award me an appeal on all points of my Petition for Appeal, reverse the lower Court's judgment stated in its letter opinion dated January 7, 1997, and in its Order entered on January 27, 1997 in their entirety; and remand for me to amend my Second Amended Motion for Judgment, conduct discovery and proceed to trial.

September 22, 1997

Respectfully Submitted,
s/ Clyde E. Clements, Jr.
Clyde E. Clements, Jr.
3024 Rivermont Avenue, Apartment 6
Post Office Box 3391
Lynchburg, Virginia 24503
Pro Se Plaintiff/Appellant
(Tel: (804) 384-3711)

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 5:20 of the Rules of the Supreme Court of Virginia, that on this the 22nd day of September, 1997 I caused a copy of my Petition for Rehearing, to be served via first-class regular mail on Clinton S. Morse, Esq., of FLIPPIN, DENSMORE, MORSE, RUTHERFORD & JESSEE, Drawer 1200, Roanoke, Virginia 24006, counsel for defendants.

s/ Clyde E. Clements, Jr.
Clyde E. Clements, Jr., Pro Se Plaintiff/Appellant

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
APR 30 1997
RICHMOND, VIRGINIA

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

CLYDE E. CLEMENTS, JR,
Plaintiff/Appellant,

v.

THE BABCOCK & WILCOX COMPANY, et al.,
Defendants/Appellees.

PETITION FOR APPEAL

Clyde E. Clements, Jr.
3024 Rivermont Avenue, Apartment 6
Post Office Box 3391
Lynchburg, Virginia 24503
(804) 384-3711

Pro Se Plaintiff/Appellant

SUBJECT INDEX

TABLE OF CITATIONS iii

RULES OF THE COURT: iii

OTHER AUTHORITIES: iv

ASSIGNMENTS OF ERROR i

QUESTIONS PRESENTED 5

STATEMENT OF THE CASE 6

STATEMENT OF FACTS 10

ARGUMENT 11

CONCLUSION 25

TABLE OF CITATIONS

CASES:

Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). 16

Bailey v. Scott-Gallaher, Inc., 253 Va. 121, 480 S.E.2d 502 (Va. 1997) 22

Bates v. Devers, 202 S.E.2d 917, 214 Va. 667 13

CBS v. Bellsouth Services, Inc., 453 S.E.2d 261, 455 S.E.2d 230 (Va. 1995) 12

Costello v. United States, 1 S.Ct. 534, 365 U.S. 265 18

Duggin v. Adams, 360 S.E.2d 832, 234 Va. 221 (Va. 1987)21

Fuller v. Edwards, 180 Va. 191, 22 S.E.2d 26 (1942) 24

Haudenschilt v. Haudenschilt, 129 W.Va. 92, 39 S.E.2d 328 (1946) 19

Hechler Chevrolet v. General Motors Corp., 230 Va. 396, 337 S.E.2d 744, (1985) 12

Hughes v. United States, 4 Wall. 232, 18 L.Ed. 303 18

Kinnear Weed Corp., v. Humble Oil & Ref. Co., C.A.5th, 1968, 403 F.2d 437, appeal after remand C.A.5th, 1971, 441 F.2d 631, certiorari denied 92 S.Ct. 285, 404 U.S. 941, 30 L.Ed.2d 2557

Lavery v. Automation Management Consultants, Inc., 234 Va. 145 (1980) 11

Montana v. United States, 440 U.S. 164, 99 S.Ct. 979 ... 15

Munden v. Harris, 153 Mo. Ct. App. 652, 134 S.W. 1076 (1911) 11

Plummer v. Center Psychiatrists, Ltd., 476 S.E.2d 172, 252 Va. 233 (Va. 1996) 4

Slagle v. Slagle, 398 S.E.2d 346, 11 Va.App. 341 (Va.App. 1990) 15

Slavin v. Curry, 574 F.2d 1256 (1978) 24

United States v. Carver, 260 U.S. 482 (1923) 18

Via v. O'Donnell, 27 Va. Cir. 433 (1982) 24

RULES OF THE COURT:

Rule 1:8 22

Rule 3:16 23

Rule 5:17 26

OTHER AUTHORITIES:

Prosser and Keaton on Torts (5th Ed., 1988) 20

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

CLYDE E. CLEMENTS, JR,

Plaintiff/Appellant,

v.

THE BABCOCK & WILCOX COMPANY, et al.,

Defendants/Appellees

PETITION FOR APPEAL

On Petition for Appeal from the Circuit Court of the County of Campbell, Honorable J. Samuel Johnston, Jr., Judge. Honorable J. Michael Gamble, Judge of the County of Amherst presided over the case in caption.

ASSIGNMENTS OF ERROR

1. The Court below erred in sustaining defendants' plea of res judicata and collateral estoppel on the ground that the federal District Court judgment was a final judgment between the *same parties* as those of instant case.

2. The Court below erred in sustaining defendants'

plea of res judicata to my intentional infliction of emotional distress claim on the ground that the District Court struck it from my federal suit because of redundancy.

3. The Court below erred in sustaining defendants' plea of collateral estoppel to my intentional infliction of emotional distress claim on the ground that the District Court found that I had presented insufficient evidence in support of my retaliatory discharge claim.

4. The Court below erred in sustaining defendants' demurrer to my claim of intentional infliction of emotional distress on the ground that I have not pled "outrageous and intolerable conduct".

5. The Court below erred in sustaining defendants' statute of limitations defense regarding my claim of intentional infliction of emotional distress.

6. The Court below erred in sustaining defendants' plea of res judicata to my defamation claim on the grounds that the District Court struck it from my federal suit because of redundancy; and that the District Court held that the defendants did not engage in any improper conduct toward me.

7. The Court below erred in sustaining defendants' plea of collateral estoppel to my defamation claim on the ground that the District Court did not find that the defendants had engaged in any improper conduct.

8. The Court below erred in sustaining defendants' demurrer to my defamation claim on the ground that I have not pled specifically any falsehood that was stated or published about me from which I suffered any damage.

9. The Court below erred in sustaining defendants' statute of limitations defense regarding my claim of defamation.

10. The Court below erred in sustaining defendants' plea of res judicata to my tortious interference with economic relationship claim on the ground that the District Court struck

it from my federal suit because of redundancy.

11. The Court below erred in sustaining defendants' plea of collateral estoppel to my claim of tortious interference with economic relationship on the ground that the District Court Judge did not find any improper conduct by the defendants.

12. The Court below erred in sustaining defendants' demurrer to my tortious interference with economic relationship claim on the ground that I fail to state a claim from which relief can be granted.

13. The Court below erred in sustaining defendants' statute of limitations defense regarding my claim of tortious interference with economic relationship.

14. The Court below erred in sustaining defendants' demurrer to my wrongful discharge in violation of public policy claim on the ground that I have alleged no Virginia statute that has been violated by my discharge.

15. The Court below erred in sustaining defendants' plea of res judicata to my wrongful discharge in violation of public policy claim on the ground that the District Court struck it from my federal suit because of redundancy; and that the District Court found that the defendants had not engaged in any wrongful conduct.

16. The Court below erred in sustaining defendants' plea of collateral estoppel to my wrongful discharge in violation of public policy claim on the ground that the District Court did not find that the defendants had engaged in any improper conduct with respect to my employment.

17. The Court below erred in sustaining defendants' statute of limitations defense regarding my claim of wrongful discharge in violation of public policy.

18. The Court below erred in relying on the federal District Court's findings and rulings, generally.

19. The Court below erred in its finding that the

federal Appeals Court and the U.S. Supreme Court agreed that the District Court apparently struck my common law claims because of redundancy under Rule 12(f) of the Federal Rules of Civil Procedure.

20. The Court below erred in not following the principle that "a demurrer admits the truth of all material facts properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred from alleged facts" (Plummer v. Center Psychiatrists, Ltd., 476 S.E.2d 172, 173, 252 Va. 233 (Va. 1996)).

21. The Court below erred in sustaining defendants' demurrer relating to my cause of action of civil conspiracy of my Amended Motion for Judgment and my proposed Second Amended Motion for Judgment.

22. The Court below erred in denying my motion for leave to amend my Amended Motion for Judgment.

23. The Court below erred in its finding that my Second Amended Motion for Judgment does not raise new claims upon which any relief can be granted.

24. The Court below erred in its failure to rule on my motion for leave to amend my Second Amended Motion for Judgment.

25. The Court below erred in its failure to address my key assertion that the facts of the federal record make out a case of prima facie retaliatory discharge, as well as a genuine issue of material fact, even though the federal court finding was that there was no evidence of record in support of my retaliatory discharge claim.

26. The Court below erred in its failure to rule on my motion for defendants to amplify their pleading.

27. The Court below erred in overlooking the facts of record in support of my assertion that the federal courts denied me an opportunity to fully and fairly litigate.

QUESTIONS PRESENTED

1. Were any of the federal District Court's findings and rulings relied on by the Court below questionable, as to whether they went to the merits; and if so, how did those questionable rulings by the federal District Court affect the outcome of my case below?
(Assignment of Error ("AE") 2, 3, 6, 7, 10, 11, 15, 16, 18, 25)

2. How did the lower court's denial of my motion for leave to amend my Amended Motion for Judgment; and the lower court's failure to rule on my orally presented motion for leave to amend my Second Amended Motion for Judgment affect the outcome of my case below? (AE 22, 24, 26)

3. How did the lower court's failure to address my argument that the federal courts denied me a full and fair opportunity to litigate, affect the outcome below? (AE 27)

4. How did the lower court's overlooking the fact that the parties to the District Court final judgment are not the same parties to instant case, affect the outcome below? (AE 1)

5. Did the Court below fail to abide by the principle that a demurrer admits the truth of all material facts properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred from alleged facts; if so, how was outcome below affected? (AE 20)

6. Did the Court below err in finding that the District Court apparently grounded its striking of my common law claims and all defendants except B&W, Alvis, Conner and Tetrault, on redundancy under Rule 12(f) of the Federal Rules of Civil Procedure; and if so, how did it affect the outcome below? (AE 2, 6, 10, 15, 19)

7. Did the Court below err in not ruling that Section 8.01-243(A) of the Code of Virginia applies to my claims at bar? (AE 5, 9, 13, 17)

8. Did the Court below err in finding that my Second Amended Motion for Judgment is only a restatement of

my Amended Motion for Judgment; and if so, what affect did it have on the outcome below? (AE 4, 8, 12, 22)

9. Did the Court below err in ruling that I have alleged no Virginia statute that has been violated by my discharge? (AE 14)

10. Is there a cause of action for invasion of privacy and civil conspiracy in the context of the facts alleged, under the common law of Virginia; and if so, how does it affect the outcome below? (AE 21)

STATEMENT OF THE CASE

This is an employment discrimination case, which includes the claims of intentional infliction of emotional distress; defamation; tortious interference with economic relationship; wrongful termination in violation of public policy; invasion of privacy; and civil (common law) conspiracy. At the time of the events giving rise to this litigation, I, pro se plaintiff/appellant Clyde E. Clements, Jr., was employed by the Naval Nuclear Fuel Division ("NNFD") of defendant The Babcock & Wilcox Company ("B&W") as an engineer.

While employed by B&W I filed a sexual harassment complaint with the Equal Employment Opportunity Commission ("EEOC"). The EEOC determined that the incident I complained of occurred, but that case precedent has established that a one time incident is insufficient to establish that I was sexually harassed.

B&W fired me without notice on September 21, 1992. I then filed a retaliatory discharge complaint with the EEOC. The EEOC subsequently determined that B&W's discharge documents ("B&W discharge document") revealed that I was fired in part for my complaining of harassment, discrimination and retaliation; that the record supports my allegation that B&W unlawfully fired me in part for opposing practices made unlawful by Title VII; and that there also appeared to be a

lawful reason for B&W's firing me ("EEOC mixed motives determination").

On October 30, 1992 I filed my original federal employment discrimination complaint with the U.S. District Court for the Western District of Virginia, Lynchburg Division ("District Court"); on February 5, 1993 the District Court granted my motion for leave to file my Amended Complaint, of which B&W, Alvis, Conner and Tetrault were the only defendants ; and on June 28, 1994 the District Court granted my motion for leave to file my Second Amended Complaint, which is against the same defendants as those of my Motion for Judgment ("M.J."), Amended Motion for Judgment ("Am.M.J.") and proposed Second Amended Motion for Judgment ("2d.Am.M.J.") of instant case. On September 9, 1994, in response to defendants' Motion for Reconsideration, the District Court struck my intentional infliction of emotional distress, defamation, tortious interference with economic relationship, wrongful termination and civil conspiracy claims, as well as all defendants except B&W, Alvis, Conner and Tetrault from my Second Amended Complaint, without setting forth its reason(s) for doing so.

This civil action was brought by me when, on September 19, 1994 I filed my original Motion for Judgment in the Circuit Court of Campbell County ("Court below" or "Circuit Court") under claims arising under the Virginia Human Rights Act, and under claims arising under the common law of the Commonwealth of Virginia. The defendants and causes of action were the same as those included in my Second Amended Complaint I had filed in District Court.

The District Court quashed my subpoenas I had prepared for discovering facts relating to the disappearance of confidential documents from my confidential file maintained by Employee Assistance of Central Virginia, Inc.; denied my motion for extension of time to complete discovery; and on

March 7, 1995 entered its Order granting defendants' motion to stay discovery that was filed on the same day that I had filed my motion to compel B&W to answer my discovery requests, without a hearing of either motion.

Among the documents on record in the District Court before the District Court heard defendants' motions for summary judgment are: the B&W discharge document, *supra*; EEOC mixed motives determination, *supra*; excerpts from the transcript of the deposition of defendant James A. Conner, then and now B&W, NNFD's Vice President and General Manager.

The District Court's hearing of defendants' motion for summary judgment took place on March 9, 1995; and on April 24, 1995 the District Court granted B&W's pre-trial motion for summary judgment and entered a final judgment in favor of all defendants. The District Court's accompanying unpublished memorandum opinion included its finding that the record contained no evidence in support of my retaliatory discharge claim; and that B&W had a legitimate nondiscriminatory reason for firing me - namely, disloyalty.

I then appealed to the U.S. Court of Appeals for the Fourth Circuit ("Appeals Court"). The Appeals Court subsequently entered judgment for the defendants, affirming on the reasoning of the District Court in an unpublished unsigned per curium opinion. My Petition for Rehearing was subsequently denied.

I then filed my Petition for a Writ of Certiorari with the U.S. Supreme Court, which was subsequently denied. My Petition for Rehearing was also denied.

On June 27, 1996 the District Court denied my motion to vacate judgments; and advised me that any further pursuit of my case in the District Court, or with the Appeals Court could result in Rule 11 sanctions.

Defendants' plea in bar and demurrer was heard on October 23, 1996 by the Circuit Court of Amherst County

("Court below" or "Circuit Court"). The Court below subsequently sustained defendants' plea in bar and demurrer in its entirety; and denied my motion for leave to amend my Amended Motion for Judgment, concluding that my proposed Second Amended Motion for Judgment does not raise any new claims upon which any relief can be granted.

On December 9, 1996 the Appeals Court filed its order dismissing my Motion to Vacate Judgments on grounds of fraud on the court; and grounded its decision on its Local Rule 40(d), which does not allow the Appeals Court to entertain a request for relief after denial of rehearing. Finally, on April 14, 1997 the U.S. Supreme Court denied my Petition for a Writ of Certiorari, in which I challenge the constitutionality of the Appeals Court's Local Rule 40(d).

I timely filed my Notice of Appeal and the transcript of the lower Court's hearing of defendants' plea in bar and demurrer; and of my motion for leave to amend.

STATEMENT OF FACTS

On record is the original Plaintiff's Appendix in Opposition to Defendants' Plea in Bar and Demurrer, which contains certified true copies of the following documents from the record of my case in the federal District Court, that serve as evidence in support of my claims:

EEOC Letter of Determination of July 30, 1992, that states that the EEOC found that the one time incident I complained of as sexual harassment occurred; B&W's Disciplinary Report, in which B&W states that I was fired for complaining of harassment, discrimination and retaliation; EEOC Letter of Determination of February 23, 1994, that documents that, in essence, the EEOC found that aforementioned B&W's Disciplinary Report contains proof of prima facie retaliatory discharge; the January 4, 1995 John Geier, counsel for defendants letter in which the defendants admit that a document

I requested production of through discovery was no longer in my confidential file maintained by defendant Employee Assistance of Central Virginia, Inc. ("EACV"); transcript of defendant Conner's deposition, during which he responded "No" to my question, "Do you have any reason to believe that I was a disloyal employee?"; transcript of District Court's March 9, 1995 motions hearing; and the District Court docket sheets.

The documents above prove that, before defendants' motion for summary judgment was granted, the record of the District Court contained proof of prima facie retaliatory discharge; and a genuine issue of material fact regarding B&W's proffered reason for firing me. At the very least, my retaliatory discharge claim should have gone to trial -- but it did not.

The documents above also show that the District Court denied me a full and fair opportunity to conduct my discovery. For example, after approximately 45 days of waiting for B&W to answer my second set of discovery requests, I filed a motion to compel. On the same day, B&W filed its motion to stay discovery. Without a hearing of either motion, the District Court granted B&W's motion to stay.

In its Memorandum Opinion relating to its granting defendants' motion for summary judgment, the District Court, in essence, stated that the record contained no evidence in support of my retaliatory discharge claim. In sustaining defendants' plea in bar, honorable Court below relies in part on this erroneous finding of the District Court, as shown by its letter opinion.

ARGUMENT

I. My Invasion of Privacy Claim, in the context of the facts alleged, appears to be a case of first impression.

In Lavery v. Automation Management Consultants, Inc.,

234 Va. 145 (1980), which addresses an invasion of privacy claim where plaintiff's name was appropriated for trade purposes, this Court quotes Munden v. Harris, 153 Mo. Ct. App. 652, 134 S.W. 1076 (1911):

> Property is not necessarily a taxable thing any more than it is always a tangible thing. It may consist of things incorporeal, and things incorporeal may consist of rights common in every man. One is not compelled to show that he used, or intended to use any right which he has, in order to determine whether it is a valuable right of which he cannot be deprived, and in which the law will protect him.

Lavery, supra, at 152, 153.

Documentation of one's psychoanalysis is that -- and more. What we think, what we feel, where we stand with the median -- what could be more sensitive, more confidential; a greater degree of personal property than these?

I allege in my Am.M.J and in my 2nd.Am.M.J. that B&W sent me to defendant EACV in retaliation for my complaining of unlawful harassment, discrimination and retaliation; and that EACV was induced by co-conspirator B&W to generate a fraudulent, false and defamatory confidential record for the purpose of destroying my credibility in the case that I chose to oppose the unlawful acts perpetrated by defendants to injure me.

The Lavery Court goes on to say, "We note too that courts in other jurisdictions have found property rights in a person's name or likeness even without a statute of the kind that exists in Virginia. * * *" Lavery at 152. There being courts in other jurisdictions that have recognized an invasion of privacy cause of action even without a statute of the kind that exists in Virginia, it logically follows that this Court has jurisdiction to recognize an invasion of privacy cause of action in the context

of the facts alleged in my 2d.Am.M.J., in light of the fact that Virginia already has an invasion of privacy statute.

II. My civil (common law) conspiracy claim -- even though the related facts alleged satisfy this Court's definition of civil conspiracy -- may, because of the context of the facts within which it is alleged, be a case of first impression.

> A common law conspiracy consists of two or more persons combined to accomplish, by some concerted action, some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means. *Hechler Chevrolet v. General Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985) * * * foundation for a civil action of conspiracy is the damage caused by the acts committed in furtherance of the conspiracy * * *.

CBS v. Bellsouth Services, Inc., 453 S.E.2d 261, 267, 455 S.E.2d 230 (Va. 1995). Emph. added.

I allege in my pleadings of the record of the Court below that defendants knowingly and wilfully took part in a civil conspiracy, the intent of which was to injure me with acts of continuing violations in furtherance of the conspiracy, including: attempted entrapment through a scheme of sexual harassment; harassment during the course of employment; intentional infliction of emotional distress; defamation; tortious interference with economic relationship; invasion of privacy; wrongful termination; and obstruction of my discovery.

Even though Hechler, *supra*, and CBS, *supra*, are cited in Plaintiff's Memorandum of Law in Opposition to Defendants' Plea in Bar and Demurrer at 45-46, the Court below stated in its Letter Opinion at 8, "There are no causes of action for * * * civil conspiracy under Virginia common law." The lower

court's grounds for not recognizing civil conspiracy as a viable claim in Virginia is, therefore, in error; which, in turn, makes its failure to address my civil conspiracy claim reversible error.

III. The Court below erred in sustaining defendants' plea of res judicata and collateral estoppel (Assignment of Error No. 1):

> *Res judicata-bar* is the particular preclusive effect commonly meant by use of the term '*res judicata*'. A valid personal judgment on the merits in favor of defendant bars relitigation of the *same cause of action* * * * between the same parties and their privies.

Bates v. Devers, 202 S.E.2d 917, 920, 921, 214 Va. 667. Underlining added.

The District Court's order striking my common law claims also struck all defendants from my federal Second Amended Complaint except B&W, Alvis, Conner and Tetrault (P.App. 9 at 8, D.E. 33). As documented by the footnote on the first page of the District Court's Memorandum Opinion (P.App. 8 at 2), the District Court's final judgment applies to only B&W, Alvis, Conner, Tetrault and me. My M.J., Am.M.J. and my 2d.Am.M.J. filed in the Court below name B&W, EACV, Allen, Alvis, Boykan, Conner, Eckert, Fees, Grainger, Howson, Lefew, Lineberry, Pagans, Slough, Smith and Tetrault.

The Court below states in its letter opinion at 4:

> It is clear from reviewing the pleadings of the Complaint in federal court, that the allegations supporting that case are the same allegations supporting the instant case. * * * this was a final judgment on the merits in the same cause of action between the *same parties*. * * * Italics added.

Since the District Court's final judgment is not between the same parties as those of instant case, the lower court's sustaining defendants' plea of res judicata on grounds that the parties of the federal District Court final judgment and those of instant case are the same, is reversible error.

Because at least two of the lower court's additional grounds for sustaining defendants' plea of res judicata and collateral estoppel are common to each of my causes of action at bar, I will present my arguments affecting those two first:

The Court below states on Page 4 of its letter opinion,

> * * * Although the United States District Court judge did not clearly state, it is apparent that Count Five [intentional infliction of emotional distress] of the Complaint was merely redundant of the federal causes of action that were pled. The Fourth Circuit Court of Appeals and the United States Supreme Court agreed. Therefore, this was a final judgment on the merits in the same cause of action between the same parties. Thus, the plea of res judicata is sustained. * * * Additionally, the defendants' plea of collateral estoppel is also sustained. * * * It is obvious that if the plaintiff in the instant case could not allege sufficient facts to demonstrate that B&W terminated him in retaliation for his claims with the EEOC, there are not sufficient allegations to support a claim of intentional infliction of emotional distress. * * *

Brackets and their contents added.

The lower court's aforementioned grounds for sustaining defendants' plea of res judicata and collateral estoppel are in error for the following reasons:

A. The record of my federal proceeding is devoid of facts indicating that the District Court struck my

common law claims because they were redundant with respect to my federal claims of sexual harassment, retaliation in the course of employment and retaliatory discharge. As evidenced by defendants' Brief of Appellees filed with the Court below, and made part of their Appendix, the defendants did not allege that my common law claims -- not even my wrongful discharge claim -- were redundant. Further, it is an undisputed fact that the District Court did not give a reason for its striking my common law claims and all defendants except B&W, Alvis, Conner and Tetrault:

B. "Finally, '[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in [the] prior litigation.' *Montana v. United States*, 440 U.S. at 164 n. 11, 99 S.Ct. at 979 n. 11." Slagle v. Slagle, 398 S.E.2d 346, 349, 11 Va.App. 341 (Va.App. 1990).

It is an undisputed fact that the record of the federal proceeding contains: 1) B&W's Disciplinary Report signed and dated by two B&W managers, in which B&W states that my complaining of harassment, discrimination and retaliation are among its reasons for firing me; 2) B&W's allegation that I was fired for disloyalty; 3) transcript of defendant Conner's deposition during which he responded, "No" to my question, "Do you have any reason to believe that I was a disloyal employee?" (Transcript of District Court hearing of motions, Plaintiff's Appendix in Opposition to Defendants' Plea in Bar and Demurrer, Exhibit 6 at 34 ("P.App. 6 at 34"), shows that I alerted the court to this fact); 4) the EEOC's determination of my retaliatory discharge complaint, in which the EEOC states that the record supports my claim that I was discharged for opposing acts made unlawful by Title VII, and that it appears that there was also a lawful reason for firing me.

Further, it is an undisputed fact that the District Court stated in its Memorandum Opinion relating to its granting

defendants' motion for summary judgment, "More importantly, plaintiff has not presented a shred of evidence, other than bare allegations, to meet his burden to show that B&W would not have terminated him but for his claims with the EEOC * * * Because plaintiff has presented no evidence, other than the fact of his termination, to show retaliatory intent, he has failed to make out a prima facie case of discrimination * * * Finally, as discussed above, Clements has not presented a scintilla of evidence to show that B&W's stated reasons for his discharge were merely a pretext. * * *".

The District Court, in effect, ignored the evidence of record in support of my retaliatory discharge claim. Clearly, redetermination of the issue of wrongful termination of violation of public policy is warranted. The lower court's sustaining defendants' preclusion defense against my wrongful termination claim -- and against my other claims -- is reversible error.

C. The District Court denied me a full and fair opportunity to litigate:

> * * * collateral estoppel does not apply 'when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case.' *Allen v. McCurry*, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980).

Slagle v. Slagle, 398 S.E.2d 346, 349, 11 Va.App. 341 (Va.App. 1990).

The record of the Court below contains proof that the federal courts denied me a full and fair opportunity to litigate -- namely, the docket sheets of the federal case record, filed in the Court below as P.App. 9. Said docket sheets show that the District Court: a) denied my motion for extension of time to complete discovery (Docket Entry ("D.E.") 53) even though it

had previously granted defendants' two motions for extension of time (D.E. 29, 35); b) granted defendants' motion to quash my subpoenas I had prepared for discovering facts relating to the disappearance of a material confidential document from my confidential file maintained by defendant Employee Assistance of Central Virginia, Inc. (D.E. 52); c) granted defendants' motion to stay discovery that was filed on the same day my motion to compel B&W to answer my discovery requests was filed (D.E. 62); d) denied me a hearing of my aforementioned motion to compel, D.E. 59.

The lower Court's sustaining defendants' plea of collateral estoppel, even though facts of record show that the District Court denied me a full and fair opportunity to litigate is contrary to the law of the Commonwealth of Virginia, and is therefore reversible error.

D. The record of the Court below contains my allegation of improprieties by the District Court judge, fraud on the District Court and fraud on the Appeals Court:

> Whatever might be the usual consequences of res judicata and collateral estoppel, they would not preclude a renewed effort to attack a judgment on grounds of improprieties by the trial judge and fraud on both the district court and court of appeals.

Kinnear Weed Corp., v. Humble Oil & Ref. Co., C.A.5th, 1968, 403 F.2d 437, 439-440, appeal after remand C.A.5th, 1971, 441 F.2d 631, certiorari denied 92 S.Ct. 285, 404 U.S. 941, 30 L.Ed.2d 255.

As documented by the transcript of the telephonic argument before Judge Turk filed by defendants in the Court below, I filed with the District Court a motion for leave to vacate judgments on grounds of fraud on the court. It appears that Judge Turk, by his presiding over the hearing of my motion

in which I allege he is the one who committed the fraud on the court, was in violation of Canon 3.C. of the Code of Conduct of United States Judges, 150 Federal Rules Decisions, 307 at 311, which states, in relevant part,

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: * * * (c) the judge knows that * * * the judge * * * has * * * interest that could be affected by the outcome of the proceeding * * *

Because of the appearance that the judge presiding over the hearing of my motion to vacate, by his not disqualifying himself, was in violation of said Code of Conduct, it cannot be said that the District Court's dismissing as frivolous my motion to vacate was a determination on the merits.

The record of instant case also documents my allegation of fraud on the Appeals Court. Please see the copy of the Motion to Vacate Judgments I filed with the Appeals Court that is attached to defendants' December 6, 1996 letter to the Court below (pp 446-474 of record). The Appeals Court's dismissal of said motion to vacate was grounded on the Appeals Court's Local Rule 40(d), which does not allow the Appeals Court to entertain requests for relief after denial of rehearing.

> In Hughes v. United States, 4 Wall. 232, 237, 18 L.Ed. 303, it was said: "* * * If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the *want of jurisdiction*, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

Costello v. United States, 1 S.Ct. 534, 545, 365 U.S. 265, 286. Italics added.

Since the Appeals Court's grounds for dismissing said motion to vacate is jurisdictional in nature, it logically follows that said Appeals Court's dismissal of my motion to vacate on grounds of fraud on the Appeals Court was not a determination on the merits.

On April 14, 1997 the U.S. Supreme Court, without determining the merits, denied my Petition for Writ of Certiorari, in which I challenged the constitutionality of the Appeals Court's Local Rule 40(d):

> [t]he denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times.

United States v. Carver, 260 U.S. 482, 490 (1923)

My point, here, is that the issue of whether the District Court and the Appeals Court's rulings that favor defendants are the result of fraud on those courts is still unresolved. And, because they are unresolved, I respectfully submit that it is unfair for the Court below to rely on the findings and rulings of the District Court and Appeals Court when addressing defendants' plea in bar and demurrer.

The lower court's relying on the findings and rulings of the federal District and Appeals Courts, which are in question for the reasons stated above, is contrary to the law of Virginia; and, therefore, renders all those lower court sustainings of defendants' plea in bar and demurrer that are grounded on the District Court's findings and/or rulings, reversible error:

> Principles of collateral estoppel may not be invoked to sustain fraud. *Haudenschilt v. Haudenschilt*, 129 W.Va. 92, 113-14, 39 S.E.2d 328, 329 (1946).

Slagle v. Slagle, 398 S.E.2d 346, 350, 11 Va.App.341 (Va.App. 1990).

E. The District Court's dismissal of my claims were not grounded on determination of the merits:

> At common law dismissal on a ground not going *to the merits* was not ordinarily a bar to a subsequent action on the same claim.

Costello v United States, 81 S.Ct 534, 545, 365 U.S. 287, 285. Italics added.

For the reasons stated in A., B., C. and D. above, the findings and rulings of the federal courts did not go to the merits of my claims. Therefore, the lower Court's grounding its rulings on said federal court findings and rulings is reversible error.

IV. The Court below erred in sustaining defendants' demurrer as to each count of my Am.M.J. and my 2nd.Am.M.J.:

A. Intentional Infliction of Emotional Distress: The Court below states in its letter opinion at 4:

> The allegations in the Motion for Judgment simply do not support the requirement of outrageous and intolerable conduct * * * The only allegations of outrageous and intolerable conduct are conclusions set forth in the pleadings. Conclusions are not legally sufficient. Thus, the Demurrer is sustained.

The lower court's finding that I failed to sufficiently allege outrageous and intolerable conduct is in error for the following reasons:

> * * * The extreme and outrageous nature of the conduct may arise not so much from what is done as from abuse by the defendant of some relation or position which gives the defendant actual or apparent power to damage the plaintiff's interests. * * * Still another basis on which extreme outrage can be found is the defendant's knowledge that the plaintiff is especially sensitive, susceptible and vulnerable to injury through mental distress at the particular conduct. * * * There are, however, a few cases which indicate that liability for extreme outrage is broader and extends to situations in which there is no certainty, but merely a high degree of probability that the mental distress will follow, and the defendant goes ahead in conscious disregard of it. * * *

Prosser and Keaton on Torts, (5th Ed., 1988) § 12. Infliction of Mental Distress, *Extreme Outrage*, at 61, 62, 64

I allege in my Am.M.J., and in my 2d.Am.M.J., that defendant Tetrault said to me, upon my complaining of sexual harassment, discrimination, retaliation and other bizarre harassment, in words or in substance, "I think you think these things are going on because of your Vietnam experiences." Mr. Tetrault knew that I had served in Vietnam as a combat Marine. I further allege that he then sent me to defendant EACV in retaliation for my complaining of said unlawful treatment; and I allege facts of Mr. Tetrault's personally taking part in the bizarre harassment of me after I had gone to EACV.

Further, I allege that B&W induced EACV to falsify confidential documents relating to me to give the impression that I was paranoid -- or at least overly sensitive because of my Vietnam experiences; and therefore, not a credible witness, in the event that I chose to take legal action. Upon my subpoenaing EACV for the purpose of getting the original suspect documents to test for authenticity, defendants admitted

that the documents (the documents I suspect of having been fraudulently produced) are no longer in my confidential file maintained by EACV.

Please note that I plead my intentional infliction of emotional distress claim with greater specificity in ¶¶ 214 thru 220, and elsewhere in my 2d.Am.M.J..

B. Defamation: The Court below states in its letter opinion at 6, "In the instant case, the plaintiff simply has not pled specifically any falsehood that was stated or published about him from which he suffered any damage." One of the reasons I filed my 2d.Am.M.J. was to allege facts with specificity in support of my defamation claim. I am confident that this Court will find that it defeats defendants' demurrer.

C. Tortious Interference with Economic Relationship: The Court below states in its letter opinion at 6,

> * * * In the instant case, the plaintiff was an at-will employee who could be terminated at any time. Thus, it was not possible to interfere with his employment contract because his employment contract could be terminated at any time.

I cite the following in Plaintiff's Memorandum of Law in Opposition to Defendants' Plea in Bar and Demurrer at 39:

> * * * when a contract is *terminable at will*, a plaintiff, in order to present a prima facie case of tortious interference, must allege and prove not only an *intentional* interference that caused the termination of the at-will contract, but also that the defendant employed '*improper* methods.' * * *

Duggin v. Adams, 360 S.E.2d 832, 835, 836, 234 Va. 221 (Va. 1987).

Because the finding of the Court below is in conflict with the Duggin Court, the lower court's sustaining defendants' demurrer on the grounds stated above is reversible error.

D. Wrongful Termination in Violation of Public Policy: The Court below states in its letter opinion at 7:

> The plaintiff in the instant case has alleged no Virginia statute that has been violated by his discharge. The plaintiff was an at-will employee. Thus, the Demurrer is sustained and Count Four is dismissed.

I allege that I was fired in retaliation for complaining of sexual harassment, discrimination and retaliation in the course of employment. In my Am.M.J. at ¶ 125, and in my 2d.Am.M.J. at ¶ 259, I cite the Virginia Human Rights Act, in support of my wrongful termination claim:

> * * * we noted in Lockhart that while the cause of action for wrongful termination based on gender discrimination arose independently from the Virginia Human Rights Act, the public policy articulation in that Act satisfies our requirement in Lawrence Chrysler Plymouth Corp. for identifying a statutory embodiment of the public policy of the Commonwealth.

Bailey v. Scott-Gallaher, Inc., 253 Va. 121, 480 S.E.2d 502 (Va. 1997)

Because the lower court's holding is in conflict with that of the Bailey court, the lower court's sustaining defendants' demurrer on the grounds stated above is reversible error.

V. Honorable Court below abused its discretion in denying my motion for leave to amend:

Leave to amend should be liberally granted in furtherance of the ends of justice.

Rules of the Supreme Court, Rule 1:8.

The Court below states in its order; and incorporated letter opinion at 8:

> In addition, plaintiff's motion for leave to amend is denied. Further, the Court has considered the proposed Second Amended Motion for Judgment and concluded that it does not raise any new claims upon which any relief can be granted. * * * The Second Amended Motion for Judgment is a restatement of the same allegations as the Amended Motion for Judgment, except it adds a count for invasion of privacy and civil conspiracy. There are no causes of action for invasion of privacy and civil conspiracy under Virginia common law. Thus, there are no new matters to act on in the Second Amended Motion for Judgment.

The lower court's findings are in error for the following reasons:

A. My 2d.Am.M.J. is not a restatement of my Am.M.J.. By comparing the four Counts of the Am.M.J. (¶¶ 113 thru 128) with the respective Counts of the 2d.Am.M.J. (¶¶ 214 thru 261) -- in particular Defamation, Count Two -- this Court will readily see that the latter is not a restatement; it pleads with specificity, whereas the former may not.

B. As already discussed in this Petition, *supra*, civil conspiracy is a cause of action under Virginia common law. Previously discussed as well, is the possibility that my civil conspiracy claim, given its context, may be a case of first impression. The same applies to my invasion of privacy claim.

C. The Court below did not rule on my motion for leave to amend my 2d.Am.M.J.. During the hearing of defendants' plea in bar and demurrer; and my motion for leave to amend, I said,

> Also, I'd like to ask Your Honor if I may be given an opportunity to amend my Second Amended Motion for Judgment in the case if the Court believes that I have improperly or have not completely satisfied the requirement of each of my claims at bar as far alleging allegations of facts.

(T 36, L 25 thru T 37, L 5)

D. The Court below did not rule on my motion for defendants to amplify their pleading (Rule 3:16). During the hearing of defendants' plea in bar and demurrer; and my motion for leave to amend, I asked defendants to amplify their pleading on 2d.Am.M.J.

E. I was diligent in seeking leave to amend.

For the reasons stated above, Honorable Court abused its discretion in denying my motion for leave to amend my Amended Motion for Judgment.

VI. The Court below erred in sustaining defendants' statute of limitations defense :

PLEASE NOTE: My common law claims, together with my allegation of civil conspiracy, were filed with the Court below BEFORE the General Assembly's 1995 Amendments to the Code of Virginia were enacted.

All my claims at bar are timely for the following reasons, which were presented to the Court below:

A. My allegations of civil conspiracy, fraudulent concealment and obstruction of justice, if proven, toll all limitations periods to the date of the last overt act in

furtherance of the civil conspiracy:

> Where alleged continuing conspiracy to deprive him of his civil rights and where complaint was filed within year of last overt act alleged in the complaint, none of the individual components of plaintiff's conspiracy claim was barred by any Texas statute of limitations.

Slavin v. Curry, 574 F.2d 1256 (1978)

B. All my claims at bar are personal injuries.

> * * * the [Fuller v. Edwards, 180 Va. 191, 22 S.E.2d 26 (1942)] Court held quite cogently and emphatically, quoting Blackstone, Kent, Cooley, Minor and Jones, that defamation involved personal injuries. * * *

Via v. O'Donnell, 27 Va. Cir. 433 (1982). Brackets and their contents added.

Judge Coulter's argument, which I wish to incorporate as part of my argument, as to why Via's defamation claim is a personal injury readily applies to all my causes of action at bar. A copy of Via, *supra*, is attached to P.App. 12.

The statute of limitations for personal injuries is two years, as provided by § 8.01-243(A) of the Code of Virginia. Therefore, the statute of limitations for each of my causes of action is at least two years.

B. The record of the Court below contains my argument with supporting facts that because I allege facts of civil (common) law conspiracy, obstruction of justice and fraudulent concealment, all limitations periods are tolled.

CONCLUSION

In the case that this Court finds that the record has not developed to the point that allows a determination of the issue of whether I have sufficiently alleged facts of invasion of privacy and of civil conspiracy, I respectfully request that both claims be remanded to the lower court for discovery, hearing and trial to develop the facts and issues.

For the foregoing reasons, the judgment for defendants should be set aside in its entirety and the case remanded for discovery and trial.

April 28, 1997

Respectfully Submitted

s/ Clyde E. Clements, Jr.

Clyde E. Clements, Jr.
3024 Rivermont Avenue, Apartment 6
Post Office Box 3391
Lynchburg, Virginia 24503
Pro Se Plaintiff/Appellant
(Tel: (804) 384-3711)

CERTIFICATE

Pursuant to Rule 5:17 of the Rules of the Supreme Court of Virginia, I, Clyde E. Clements, Jr., Pro Se Appellant, certify as follows:

(1) The names of all plaintiffs/appellants is Clyde E. Clements, Jr. The names of all defendants/appellees are: The Babcock & Wilcox Company; Employee Assistance of Central Virginia, Inc.; Frank C. Allen, Jr.; Merle T. Alvis; Laurie L. Boykan; James A. Conner; John P. Eckert; John A. Fees; Susan S. Grainger; Robert E. Howson; Dewitt T. Lefew, III; Lawrence L. Lineberry; Lonza R. Pagans, Jr.; George K. Slough; Steven W. Smith; and Roger E. Tetrault. Plaintiff/appellant, CLYDE E. CLEMENTS, JR., is Pro Se. The names, addresses and telephone numbers of counsel for The Babcock & Wilcox Company; Employee Assistance of Central Virginia, Inc.; Frank C. Allen, Jr.; Merle T. Alvis; Laurie L. Boykan; James A. Conner; John P. Eckert; John A. Fees; Susan S. Grainger; Robert E. Howson; Dewitt T. Lefew, III; Lawrence L. Lineberry; Lonza R. Pagans, Jr.; George K. Slough; Steven W. Smith; and Roger E. Tetrault, defendants/appellees is Clinton S. Morse, Esquire, FLIPPIN, DENSMORE, MORSE, RUTHERFORD & JESSEE , Post Office Drawer 1200, Roanoke, Virginia 24006, Telephone: (540) 510-3000;

(2) A copy of the petition for appeal has been mailed to all opposing counsel on the 28th day of April, 1997 (there are no defendants/appellees not represented by counsel);

(3) I, Pro Se plaintiff/appellant desire to state orally to a panel of this Court the reasons why this appeal should be granted, in person.

s/ Clyde E. Clements, Jr.
Clyde E. Clements, Jr.
Pro Se Plaintiff/Appellant

VIRGINIA:

IN THE CIRCUIT COURT OF CAMPBELL COUNTY

CLYDE E. CLEMENTS, JR.,	)
Plaintiff,	)
	)
vs.	)
	)
THE BABCOCK & WILCOX COMPANY, et al.	)
LAW NO. CL 94000218-00	)
Defendants.	)
	)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PLEA IN BAR AND DEMURRER

VIRGINIA
CIRCUIT COURT
CAMPBELL COUNTY
Received and Filed this the
17th day of Sept, 19 96
DEBORAH E. HUGHES,CLERK
Teste: s/ S W Bosiger
Deputy Clerk

Clyde E. Clements, Jr.
Pro Se Plaintiff
Post Office Box 3391
Lynchburg, Virginia 24503
(804) 846-2521

VIRGINIA:

IN THE CIRCUIT COURT OF CAMPBELL COUNTY

CLYDE E. CLEMENTS, JR.,
Plaintiff,

vs.

THE BABCOCK & WILCOX COMPANY, et al.
LAW NO. CL94000218-00
Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PLEA IN BAR AND DEMURRER

COMES NOW plaintiff, Clyde E. Clements, Jr., pro se, ("Mr. Clements") and respectfully requests that this Court DENY Defendants' Plea in Bar and Demurrer; and DENY Defendants' request for sanctions against him, on the grounds that:

PRELIMINARY STATEMENT

Defendants, on pages 1, 4, 13, 17 of their Memorandum of Law in Support of Defendants' Plea in Bar and Demurrer state, "The EEOC * * * concluded that Clements' employment claims are frivolous. * * * The EEOC * * * investigated his employment claims and * * * concluded that they were meritless. * * * This fantasy implicates none of the defendants other than through paranoid conjecture. * * * Any emotional distress which plaintiff has suffered is the unfortunate and

pitiful product of his own, considerable fantasy."

The EEOC documented in its September 3, 1996 letter to U.S. Senator Charles Robb that the EEOC found a violation (See Pl.Exh. 11).[1] The Veterans Administration, in its letter dated March 17, 1995 documented that it contacted the Navy Inspector General's office in behalf of Mr. Clements to see if they would investigate B&W (See Pl.Exh. 7 at 2).

If Mr. Clements is paranoid, then it logically follows that the EEOC and the Veterans Administration are paranoid, as well.

I. PLAINTIFF'S CAUSES OF ACTION AT BAR ARE NOT BARRED BY THE DOCTRINES OF RES JUDICATA OR COLLATERAL ESTOPPEL.

PLEASE NOTE: Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9 contained in the original Plaintiff's Appendix in Opposition to Defendants' Plea in Bar and Demurrer are certified true copies by the United States District for the Western District of Virginia, Lynchburg Division. Exhibits 1 through 7 being certified true copies, together with their filing date shown on the U.S. District Court Docket Sheets (Pl.Exh. 9), serve as proof that they were on record before the federal court ruled on defendants' motion for summary judgment (See Pl.Exh. 8).

As evidenced by the transcript of the federal District Court's hearing of B&W's motion for summary judgment (See Pl.Exh. 6), and by its Memorandum Opinion (See Pl.Exh. 8), a significant portion of the federal court's discussion of Mr.

---

[1] The exhibits to this brief are herein referred to as "Pl.Exh. __" and are included in the accompanying Appendix. "Def.Exh. __" refers to an exhibit included in defendants' Appendix that accompanys their Memorandum of Law in Support of Defendants' Plea in Bar and Demurrer.

Clements' case is surplusage or dicta, and therefore is not part of the findings of the federal court.

> * * * I am persuaded by the discussion in the cases cited by the plaintiffs that all of the discussion by the Federal Court was surplusage or dicta and was not a part of the findings
>
> of the Court. I believe that the plaintiffs have a right to convince this Court and/or the trier of the facts of the merits of their state antitrust claim. For these reasons, I do not find as a matter of law that the state antitrust claims are barred either by res judicata, estoppel, or stare decisis."

Tempkin v. Lewis-Gale Clinic, Inc., 27 Va. Cir. 220 (1992) at 223.

For example, during the federal District Court's hearing of B&W's motion for summary judgment the judge -- *even though the judge had before him a copy of the EEOC's finding that the incident Mr. Clements complained of as sexual harassment occurred* (See Pl.Exh. 1) -- said to Mr. Clements:

> But a person that is paranoid never knows that they are paranoid and you can never reach them on these things. * * * that's a horrible thing to do if the lady didn't do it. * * * And she says that she didn't recall that any buttons were unbuttoned. What else could she do in denying it? This lady has vehemently --- And, you know, if you've made this up on this lady, that's a terrible, terrible thing to do. * * * I think that, you know, whether it occurred --- I think you think that it occurred. I'm not saying that you are intentionally lying. * * * That is an inditia of paranoia * * * Have you been to a psychiatrist?

Pl.Exh. 6 at 19, 21, 22, 25, 26

The federal District Court appears to have put Mr. Clements' credibility on trial during the hearing of B&W's

motion for summary judgment and found him guilty of unintentionally lying as the result of paranoia and, therefore not capable of giving reliable testimony. The federal District Court then appears to rely on its finding that Mr. Clements is not a credible witness as grounds for ignoring the material facts of record -- some of which are from disinterested third-party sources, such as the EEOC (Pl.Exh. 1, 3) and the Veterans Administration (Pl.Exh. 7) -- in support of his claims.

An employer considers a particular conduct of an employee to be disloyal but, instead of making the employee aware of its displeasure with said conduct, it gives the employee its consent to continue with the conduct. The employer, after allowing the employee to continue with the "disloyal" conduct that it had consented to for over two years, fires the employee. Can the employer then claim disloyalty as a legitimate nondiscriminatory reason for firing the employee?

This question has been addressed by case law, and Mr. Clements cited the pertinent portions of Robin v. Sydeman Bros., 163 S.E. (Va. 1932) 103 during the federal District Court's Hearing of defendants' motion for summary judgment. Please see Pl.Exh. 6 at 33.

Mr. Clements presented to the federal District Court and to the federal Appeals Court the following material facts in support of his assertion that B&W gave him its constructive assent[2] or

---

[2] Constructive assent defined:

An assent or consent imputed to a party from a construction or interpretation of his conduct or interpretation of his conduct; as distinguished from one which he actually expresses.

Black's Law Dictionary (6th Ed. 1990), at 313

implied consent[3] for his letter-writing to McDermott, to the Navy, and to the DOE:

FACT A) B&W rewarded Mr. Clements with "Good" to "Very Good" Job Performance Evaluations, and with regular raises and promotions for the duration of the period of his letter-writing (See Pl.Exh. 8 at 1, 2);

FACT B) B&W had knowledge of his letter-writing (See Pl.Exh. 6 at 14);

FACT C) B&W never gave Mr. Clements a directive to stop his letter-writing (See Pl.Exh. 6 at 32);

FACT D) B&W never made Mr. Clements aware of any displeasure it may have had regarding his letter-writing (See Pl.Exh. 6 at 32, 38, 39);

FACT E) Defendant Lineberry, in his August 13, 1992 meeting with Mr. Clements, said to Mr. Clements in words or in substance, "Any government-related concerns of yours is between you and the government." Lineberry's saying this is documented by B&W's document marked, "B&W 0092" that it produced in response to Mr. Clements' request for production of documents relating to his federal suit. Mr. Clements filed a copy of said document with the federal court.

FACT F) B&W never disciplined Mr. Clements at any time for any reason, until the day it fired him (See Pl.Exh. 1 at 1; 6 at 32; 8 at 1,2);

FACT G) B&W brought the Department of Energy into the confrontation -- not Mr. Clements (See Pl.Exh. 6 at 12, 13);

---

[3] Implied consent defined:

> An inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or a lack of objection under circumstances signifying assent.

Black's Law Dictionary (6th Ed. 1990), at 305

FACT H) Mr. Clements asked defendant Conner, Vice President and General Manager of B&W's NNFD at the time B&W fired Mr. Clements, "Do you have any reason to believe that I was a disloyal employee", to which Conner responded, "No." Conner also admitted during the taking of his deposition that he had knowledge of Mr. Clements' letters (See Pl.Exh. 5 at 13; Pl.Exh. 6 at 33, 34).

B&W's rewarding him during the period of his letter-writing with only "Good" to "Very Good" JPE's, and with regular raises and promotions in light of the fact that B&W had knowledge of his letter-writing; Conner's telling him that he had no reason to believe that Mr. Clements was a disloyal employee; B&W's not making him aware of any displeasure it may have had with his letter-writing; B&W's never giving him a directive to stop his letter-writing; and B&W's telling him that any government-related concerns of his were between him and the government, represent B&W's giving Mr. Clements its *implied consent* or *constructive assent* for him to continue his letter-writing.

With the exception of FACT A), none of the above facts is even mentioned in the federal District Court's Memorandum Opinion (Pl.Exh. 8). It therefore logically follows that the federal District Court's dismissing Mr. Clements' retaliatory discharge claim is not grounded on determination of the merits.

Regarding the issue of whether or not B&W's proffered reason for firing Mr. Clements was a pretext, the federal District Court judge said to Mr. Clements during the hearing of B&W's motion for summary judgment, "Well, I don't know how you could be more unloyal. * * * I think they had to terminate you, didn't you?" (See Pl.Exh. 6 at 23, 27). The presiding federal judge therefore relied solely on his opinion as to whether or not Mr. Clements' letter-writing was a disloyal conduct, and completely ignored the facts of record in support of Mr. Clements' assertion that B&W had given him its implied

consent or constructive assent for him to continue his letter-writing.

The federal District Court, in its Memorandum Opinion again adds surplusage and dicta to the record by expressing its opinion of the contents of Mr. Clements' letters B&W claims was the disloyal conduct that brought about its firing of him, while completely ignoring the facts of record in support of Mr. Clements' assertion that B&W's proffered reason of disloyalty is a pretext. Please see Pl.Exh. 8 at 4, 11.

A. The Federal Courts' Dismissal of Plaintiff's Retaliatory Discharge and State Tort Claims Were Not Grounded on a Determination on the Merits:

The doctrine of res judicata "...precludes relitigation of a claim or issue once a final determination ***on the merits*** has been reached by a court of competent jurisdiction." Com. Dept. of Social Services v. Johnson, 376 S.E.2d 787 (Va.App. 1989) at 788. Emphasis added.

"Res judicata literally means 'matter adjudged,' and it precludes relitigation of claim or issue once final determination ***on merits*** has been reached by court of competent jurisdiction." Com., Dept. of Social Services v. Johnson, 376 S.E.2d 787 (Va.App. 1989) at 787. Emphasis added.

The dismissal of Mr. Clements' retaliatory discharge, intentional infliction of emotional distress, defamation, tortious interference with economic relationship, civil conspiracy and wrongful termination in violation of public policy causes of action by the United States District Court for the Western District of Virginia, Lynchburg Division ("federal District Court" or "federal court") was not grounded on a determination ***on the merits*** for the following reasons:

1. Federal District Court's Dismissal of Mr. Clements' Retaliatory Discharge Claim Was Not Grounded On Determination on the Merits:

a. The Federal District Court

Completely Ignored Facts of Record Evidencing Prima Facie Retaliatory Discharge:

On September 21, 1992 B&W fired Mr. Clements and issued a discharge document it refers to as "Disciplinary Report" (See Pl.Exh. 2). Mr. Clements filed a copy of said Disciplinary Report with the U.S. District Court as "Attachment V" to his Second Amended Complaint. B&W states in the Disciplinary Report:

> * * * You have professed the following beliefs, and made the following accusations against management in your writings: * * * Ten Company Employees including the President and the General Counsel, as well as the Division Vice President, Personnel Manager, Security Manager, Engineering Manager, and others, have harassed, discriminated against, retaliated against, and attempted to inflict severe emotional distress upon you. * * * On the basis of your conduct, as summarized above, your employment with Babcock & Wilcox, NNFD, is being terminated, effective immediately.

Clearly, B&W admits in plain language in its Disciplinary Report that it fired Mr. Clements for complaining of acts made unlawful by Title VII of the Civil Rights Act of 1964, as amended. The transcript of the federal District Court Hearing of Motions shows that Mr. Clements brought the causal connection to the federal court's attention (See Pl.Exh. 6 at 29, 30).

b. The Federal District Court Completely Ignored The EEOC's Determination of Plaintiff's Retaliatory Discharge Claim:

Mr. Clements filed with the federal court a copy of the EEOC's Letter of Determination dated February 23, 1994 (Pl.Exh. 3) as "Attachment Y" to his Second Amended

Complaint, in which the EEOC states,

> Charging Party's discharge documents reveal that he was discharged in part for his accusations that management harassed, discriminated and retaliated against him. * * * The evidence of record supports Charging Party's allegation that he was discharged in part in retaliation for opposing practices made unlawful by Title VII.

("**EEOC Proof of Prima Facie Retaliatory Discharge**")

The federal District Court states on Page 10 of its Memorandum Opinion (See Def.Exh. 5 at 10):

> Because plaintiff has presented *no evidence*, other than the fact of his termination, to show retaliatory intent, he has failed to make out a prima facie case of discrimination.
> [Italics added]

In summary, B&W's Disciplinary Report, which is evidence of record in the federal court, proves causal connection between B&W's firing of Mr. Clements and Mr. Clements' complaining of acts made unlawful by Title VII; and the EEOC's determination of Mr. Clements' retaliatory discharge complaint, which is also evidence of record in the federal court, documents that the EEOC found that B&W's Disciplinary Report proves causal connection. Mr. Clements presented the causal connection to the court in his briefs filed with the court and during the hearing of defendants' motions for summary judgment (See Pl.Exh. 6 at 29, 30). In spite of these material facts of record -- and in spite of the "deference doctrine"[4] -- the federal District Court states in its

---

[4] Justice Ruth Bader Ginsburg (then appellate judge for the D.C. Circuit), in her 1990 Washington Law Review Article entitled *Remarks on Writing Separately*, states:

Memorandum Opinion that the record contains no evidence of causal connection.

B&W's Disciplinary Report (Pl.Exh. 2); the EEOC's "mixed motives" determination (Pl.Exh. 3); the federal court's transcript of the Hearing of Motions (Pl.Exh. 6), and; defendant Conner's deposition (Pl.Exh. 5) -- all of which contain evidence in support of Mr. Clements' retaliatory discharge claim, as demonstrated hereinabove -- were in the federal court record before the federal District Court prepared and entered its Memorandum Opinion and its Order granting defendants' Motion for Summary Judgment (Pl.Exh. 8). It therefore logically follows that the federal District Court's stating in said Memorandum Opinion that Mr. Clements had submitted no evidence in support of his retaliatory discharge claim is a false statement. Further, the federal District Court's dismissal of Mr. Clements' retaliatory discharge claim could not possibly have been grounded on determination of the merits.

c. The Federal District Court Completely Ignored Facts of Record Indicating that B&W's Proffered Reason for Firing Plaintiff Was a Pretext:

B&W proffers disloyalty as its legitimate nondiscriminatory reason for firing Mr. Clements is disloyalty.

---

[4] Continued:

> * * * We permit our appellate judges to disagree or distance themselves from the court's judgment by dissenting or concurring opinion. At the same time, we have doctrines, like *deference to expert administrative determinations*, that serve, among other purposes,[6] to keep the individuality of our judges within tolerable bounds. [Italics added]

65 Wash. L. Rev., 133, 134 (1990).

The conduct of Mr. Clements B&W claims to have been disloyal is: 1) his letter-writing, and; 2) his request for relief for the unlawful harassment, discrimination and retaliation against him by the defendants (See Pl.Exh. 6 at 15, 16, 31 and 34 thru 36). As discussed above, the federal District Court completely ignored the facts of record supporting Mr. Clements' assertion that B&W did not consider his letters to be a disloyal conduct until some time after he had written his last one. For example, the Memorandum Opinion does not even mention the EEOC Proof of Prima Facie Retaliatory Discharge or the Loyalty Issue.

Mr. Clements learned about making a request for relief from the EEOC. The EEOC mistakenly instructed Mr. Clements that the Civil Rights Act of 1991 applied to his sexual harassment charge (See Pl.Exh. 6 at 35). Therefore, Mr. Clements' submitting to B&W his request for relief was a good faith effort to put an end to the confrontation. The Memorandum Opinion (Pl.Exh. 6) does not even mention the fact that Mr. Clements first learned of a request for relief from the EEOC.

1) The Federal District Court Completely Ignored Facts of Record Creating A Genuine Issue of Material Fact for Trial:

Mr. Clements asked defendant James Conner ("Conner"), then Vice President and General Manager of Babcock & Wilcox ("B&W"), Naval Nuclear Fuel Division ("NNFD") during the taking of his deposition, "Do you have any reason to believe that I was a disloyal employee?", to which he responded, "No." See Pl.Exh.5 at 13. Conner's "No" response contradicts B&W's key assertion that Mr. Clements was fired for disloyalty, thereby creating a genuine issue of material fact that normally proceeds to trial for resolution. ("**Loyalty Issue**")

Mr. Clements presented the **Loyalty Issue** to the court

in his briefs, as well as during the hearing of defendants' motions for summary judgment (See Pl.Exh. 6 at 33, 34). However, the Memorandum Opinion does not even mention the **Loyalty Issue**.

2) The Federal District Court Completely Ignored Facts of Record Indicating That B&W Gave Plaintiff Constructive Assent or Implied Consent for His Conduct B&W Now Claims Was Disloyal:

The federal District Court states in its Memorandum Opinion:

> * * * More importantly, plaintiff has not presented a shred of evidence, other than bare allegations, to meet his burden to show that B&W would not have terminated him but for his claims with the EEOC. * * * Clements has not presented a scintilla of evidence to show that B&W's stated reasons for his discharge were merely a pretext.

See Memorandum Opinion, Pl.Exh. 6 at 9, 11.

Since the federal District Court stated in its Memorandum Opinion that the record contained no evidence in support of Mr. Clements' claim that B&W's firing him was in retaliation for his having complained of acts made unlawful by Title VII, it logically follows that the federal District Court did not ground its dismissal of the retaliatory discharge claim on determination of the merits of the **EEOC Proof of Prima Facie Retaliatory Discharge** and the **Loyalty Issue** that were on record.

It therefore logically follows that since the federal District Court did not determine the merits of the evidence of record in support of Mr. Clements' retaliatory discharge claim, the issue of wrongful termination in violation of public policy is not precluded from being prosecuted by this Court.

2. The Federal District Court's Dismissal

of Plaintiff's State Tort Claims Was Not Grounded on a Determination on the Merits:

The federal District Court filed its Order granting defendants' motion to strike Mr. Clements' claims of intentional infliction of emotional distress, defamation, tortious interference with economic relationship, wrongful termination in violation of public policy and civil conspiracy (See ¶¶ 201 thru 220 of Second Amended Complaint, Def.Exh. 3) on September 9, 1994. See D.E. 33.[5] On or about October 14, 1994 Mr. Clements served his first discovery requests on B&W. The federal District Court filed its Stipulation and Order setting the schedule for discovery on October 20, 1994. D.E. 38. Said Order set the deadline date of February 1, 1995 for completion of Mr. Clements' discovery.

Since Mr. Clements had not begun his discovery at the time the federal District Court struck Mr. Clements' state tort claims; since the defendants did not file their Motion for Summary Judgment (D.E. 41) until December 9, 1994, and; since Mr. Clements did file evidence obtained from his discovery efforts in response to defendants' Motion for Summary Judgment, it logically follows that the federal District Court's dismissal of those claims could not possibly have been grounded on determination of the merits.

Mr. Clements appealed the federal District Court's granting of defendants' motion for summary judgment to the United States Court of Appeals for the Fourth Circuit ("Appeals Court"). The Appeals Court affirmed on the reasoning of the federal District Court, finding no reversible error (See Def.Exh. 6 at 2). The Appeals Court denied Mr. Clements' Petition for

---

[5] "D.E. __" refers to the docket entry numbers on the federal District Court's docket sheets, a copy of which is included in the accompanying Appendix as Exhibit 9.

Rehearing with Suggestion for Rehearing in Banc (See Def.Exh. 7). It therefore logically follows that the Appeals Court also failed to ground its ruling on the merits of Mr. Clements' claims.

B. The Federal District Court Prevented Plaintiff From Fully and Fairly Litigating His Claims:

> "* * * a person should not be bound by a judgment except to the extent that he, or someone representing him, had an adequate opportunity not only to litigate the matters adjudicated but to litigate them against the party who seeks to use the judgment against him." Clark's Adm'x v. Rucker, Ky., 258 S.W. 2d at 12.

Byrum v. Ames and Webb, Incorporated, 85 S.E. 2d 364 at 367

> * * * whether or not relief from the first judgment may be obtained, the court in the second proceeding may conclude that issue preclusion should not apply because the party sought to be bound did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the first proceeding. Such a refusal to give the first judgment preclusive effect should not occur without a compelling showing of unfairness, nor should it be based simply on a conclusion that the first determination was patently erroneous. But confined within proper limits, *discretion to deny preclusive effect to a determination under the circumstances stated is central to the fair administration of preclusion doctrine.* [Italics added]

Restatement of the Law Second, Judgments 2nd, § 28. Exceptions to the General Rule of Issue Preclusion, at 284.

On January 4, 1995 Mr. Clements filed with the federal District Court his motion to extend time to complete his discovery (D.E. 45). On or about January 12, 1995 Mr. Clements served his second set of discovery requests on

defendants (Docket sheet entry dated 1/12/95). On January 17, 1995 the federal District Court filed its Order denying Mr. Clements' motion to extend time to complete discovery (D.E. 53). On March 2, 1995 Mr. Clements filed his motion to compel B&W to answer his discovery requests (D.E. 59). In his motion he requested that his motion to compel be heard during the hearing of defendants' motions for summary judgment, which had already been set. On the same day B&W filed its motion to stay discovery (D.E. 58). On March 7, 1995 the federal District Court filed its Order granting defendants' motion to stay discovery (D.E. 62), thereby denying Mr. Clements a hearing of his motion to compel. The hearing of defendants' motion for summary judgment took place on March 9, 1995 (D.E. 66(Vol.5)).

Therefore, the federal District Court, by its preventing him from completing his discovery, prevented Mr. Clements from fully and fairly litigating his claims.

> "The doctrine of *res judicata* is a proper and important principle of law and is universally recognized in the courts of this country. * * * But the doctrine is technical in nature and one who asserts it cannot complain if the proceedings upon which he relies are subjected to technical scrutiny." Patterson v. Anderson, 194 Va. 557, 564 74 S.E.2d 195, 200.

Byrum, *supra*, at 367.

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: * * * (5) There is a clear and convincing need for a new determination of the issue * * * (c) because the party sought to be precluded, as a result of * * * special circumstances, did not have an adequate opportunity * * * to obtain a full

and fair adjudication in the initial action.

Restatement of the Law Second, Judgments 2d, § 28. Exceptions to the General Rule of Issue Preclusion at 273, 274.

C. The Appellate Court's Denial of Plaintiff's Appeal of the Federal District Court's Judgment; and Its Denial of Plaintiff's Petition for Rehearing with Suggestion for Rehearing in Banc Were Not Grounded on the Merits:

The United States Court of Appeals for the Fourth Circuit ("Appeals Court") states in its decision, "* * * we affirm on the reasoning of the district court. * * *" See Def.Exh. 6 at 2. By simply and only affirming on the reasoning of the federal District Court, the Appeals Court also failed to reach the merits of Mr. Clements' claims.

II. ALL CLAIMS OF CASE AT BAR ARE TIMELY:

Mr. Clements timely filed the claims at bar in the federal District Court. The federal District Court struck Mr. Clements' state tort claims from his civil action by its Order Entered on September 9, 1994 (See Def.Exh. 4). Ten (10) days later, Mr. Clements filed them in this Court via his Motion for Judgment, on September 19, 1994. Virginia's doctrine of equitable estoppel makes all claims at bar timely. Further, Mr. Clements alleges in his federal action, as well as in his Motion for Judgment, Amended Motion for Judgment and proposed Second Amended Motion for Judgment filed with this Court, that the causes of action at bar, as well as certain incidents occurring after B&W's firing of him were committed in furtherance of a continuing conspiracy to injure him.

> Where plaintiff alleged continuing conspiracy to deprive him of his civil rights and where complaint was filed within year of last overt act alleged in the complaint, none of the individual components of plaintiff's conspiracy claim was barred by any Texas statute of limitations.

Slavin v. Curry, 574 F.2d 1256 (1978).

According to case law, for the Court to decide the issue of timeliness before discovery and before the evidence has been presented would be inappropriate. Timeliness of some of Mr. Clements' claims at bar may depend on the date of the last overt act committed by the defendants in furtherance of the alleged common law conspiracy to injure him. The Court must first determine the merits of Mr. Clements' claims before it can determine the date of the last overt act; and, before the Court is able to determine the merits of the claims at bar, it must have before it Mr. Clements' evidence in support of said claims. It therefore logically follows that the Court cannot reasonably resolve the issue of timeliness before discovery has been completed.

> Regarding the other issues raised by the defendants, * * * the Statute of Limitations * * *, these are all taken under advisement by the Court for later decision. It will be more appropriate to decide these issues after discovery has been completed or even after evidence is presented. * * *.

Tempkin v. Lewis-Gale Clinic, Inc., 27 Va. Cir. 220 (1990) at 223.

Since Mr. Clements must submit evidence in support of his claims that B&W has continued to commit unlawful acts in furtherance of the continuing conspiracy to injure him, it logically follows that this Court's deciding the issue of timliness will be most appropriate after all evidence has been submitted.

In the event that this Court decides that the issue of timeliness must be now addressed, Mr. Clements' argument is presented below:

A. Wrongful Termination in Violation of Public Policy:

The limitations period for wrongful discharge in violation of public policy is two years. Va. Code Ann., Code

Sec. 8.01-243 (Michie 1992). It is generally understood that Code Sec. 8.01-243 is the primary or first test that is applied to those causes of action for which a limitations period is not otherwise provided by this section or by other statute. If Code Sec. 8.01-243 does not apply, then the secondary or so-called "catch-all" statute, Code Sec. 8.01-248 applies.

The following syllogism demonstrates that Code Sec. 8.01-243 applies to Mr. Clements' Wrongful Termination in Violation of Public Policy claim at bar:

(a) Under Virginia law, every action for "personal injury" has a two-year limitation.

(b) Wrongful termination in violation of public policy is an action for personal injury.

(c) Actions based on wrongful termination in violation of public policy shall be brought within two years.

Premise (a): "Personal action for injury to person * * * Unless otherwise provided in this section or by other statute, every action for personal injuries, *whatever the theory of recovery* * * * shall be brought within two years after the cause of action has accrued." Va. Code Ann. Code Sec. 8.01-243. -A. (Michie 1992) [Italics added]. Please note that *injury to person* and *personal injury* are used interchangeably, and are therefore intended to be synonymous.

Premise (b): The Supreme Court of Virginia has defined "personal injury":

> * * * Thompson v. Judy, 6 Cir., 169 F. 553, 555, where the court said: "It is true that in modern parlance the words 'personal injury' are often used to designate a physical injury to the party. But usually, when there is any attempt to put the matter into legal phraseology, these and equivalent words are understood to import the meaning in which they have long been used by recognized authorities, whether in legal text-books and

> commentaries or precise definition by courts, in classifying the rights of individuals. In 1 Blackstone's Com. 129 et seq., the author classifies and distinguishes those rights which are annexed to the person, jura personarum, and acquired rights in external objects, jura rerum; and in the former he includes personal security, which consists 'in a person's legal and uninterrupted enjoyment of his life, his limbs his body, his health, and his reputation.' * * *" The inherent rights of security in the person are not confined to security from violence done to the body. Tinker v. Colwell, 193 U.S. 473, 24 S.Ct. 505, 48 L. Ed. 754.

Fuller v. Edwards, 22 S.E.2d (1942) 26 at 28.

Unlawful termination in violation of public policy is clearly an interruption of the injured party's enjoyment of his life. Since it is an interruption of enjoyment of life, it logically follows that unlawful termination in violation of public policy is also a violation or interruption of the injured party's "personal security".

> These authorities go back to Blackstone. See Jones' Ed., sections 173 and 174, where it is said that these primary rights "may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property; because as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities *in their largest and most extensive sense*." [Italics added] Section 173. * * * Section 174. (i) Personal security.--The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body,

his health and his reputation.
Fuller at 29.

Applying the Fuller Court's definitions to a syllogism,

(a) Under Virginia law, actions for personal injury must be brought within two years.

(b) "Person" in the legal context of "injury to the person" includes "those rights which are annexed to the person". Fuller at 28.

(c) "Injury to the person" includes interruption of "personal rights". Fuller at 28, 29. ["Injury to the person" and "personal injury" are treated as being equivalent by Fuller and by Code Sec. 8.01-243.]

(d) "Personal rights" include "personal security". Fuller at 26.

(e) "Personal security" includes a person's "legal and uninterrupted enjoyment of his life". Fuller at 28, 29.

(f) Uninterrupted enjoyment of one's life includes uninterrupted financial security.

(g) "Interruption of personal security" therefore includes "interruption of financial security".

(h) "Interruption of financial security" includes wrongful termination.

(i) "Personal injury" therefore includes wrongful termination.

(j) Ergo, actions for wrongful termination must be brought within two years.

The Supreme Court of Virginia, in Purcell v. Tidewater Const. Corp., (Va. 1995) ruled that Code Sec. 8.01-248 applies to wrongful termination. But there are two fatal errors in the Purcell Court's argument, which may best be analyzed with the following syllogisms:

(a) Under Virginia law, every action for "personal

injury" has a two-year limitation.

(b) "Personal injury" is equivalent to "injury". **[FATAL ERROR #1]**

(c) A wrongful termination suit does not involve "injury" [as defined in Purcell].

- AND -

(aa) Code Sec. 8.01-243 does not apply to "personal actions". **[FATAL ERROR #2]**

(bb) A wrongful termination suit is a "personal action".

FATAL ERROR #1: As noted above in Mr. Clements' argument that Code Sec. 8.01-243 applies to wrongful termination suits, Code Sec. 8.01-243 uses "injury to person" and "personal injury" interchangeably, making them synonymous terms. The Purcell Court, by its isolating "injury" and applying its definition of that term to -243 infers that "personal", and "to person" have no effect on Code Sec. 8.01-243's intended meaning of "injury"; i.e., "personal injury", "injury to the person" and "injury" are synonymous.

The Purcell Court defines Code Sec. 8.01-243's intended meaning of "injury" as, "* * *positive, physical or mental hurt to the claimant* * *". It logically follows that the Purcell Court's definition of "injury" must also be applied to "injury to property", another term found in 8.01-243. "Injury to property" then becomes, "positive, physical or mental hurt to the claimant property", which takes the Purcell Court's argument to the point of absurdity. Can, say, a building or an automobile sustain mental hurt?

Since this conclusion is absurd, it logically follows that the Purcell Court's inferred premis that "personal"/"injury to person" have no effect on Code Sec. 8.01-243's intended meaning of "injury" is false. The Fuller Court's definition of "personal injury"/"injury to the person", *supra.*, must be applied to Code Sec. 8.01-243.

As presented in Mr. Clements' argument above, the Supreme Court of Virginia, in Fuller defines "injury to the person"to include personal security which, in turn includes "a person's legal and uninterrupted enjoyment of his life". Clearly, wrongful termination is an interruption of enjoyment of one's life". It therefore logically follows that wrongful termination is a personal injury.

FATAL ERROR #2: The Purcell Court states, "A 'personal action,' for purposes of Title 8.01, Chapter 4, Limitations of Actions, is defined as 'an action wherin a judgment for money is sought, whether for damages to person or property.' Code Sec. 8.01-228. Purcell's suit for money damages arising from wrongful termination, therefore, is by definition a personal action subject to the limitation period of Code Sec. 8.01-248 unless another limitation period is prescribed." The Purcell Court infers here that Code Sec. 8.01-243 does not apply to personal actions, which is false. In fact, the term is included in the statute's title: "*Personal action* for injury to person * * *." [Italics added]

"Personal action" appears in the title of both Code Sec. 8.01-243 and -248. Regardless of whether a cause of action is covered by -243 or by -248, it is a "personal action". Therefore, "personal action" cannot possibly be used as a criterion for determining if Code Sec. 8.01-243(A) applies to wrongful termination suits.

The Purcell Court states, "Purcell argues that wrongful termination is not an injury to property and, therefore, is a personal injury action governed by the two-year limitation period of subsection A. This construction, however, divides all personal actions into either injuries to persons or to property governed by Code Sec. 8.01-243, thereby rendering Code Sec. 8.01-248 meaningless or unnecessary." Whether or not Code Sec. 8.01-248 is meaningless or unnecessary has -- or should have -- no bearing on whether or not Code Sec. 8.01-243

applies to a particular cause of action. Why should any court burden itself with the duty of purporting meaning to what may indeed be a meaningless statute -- especially when the method used entails abandonment of the meaning of the plain language of its companion and overriding statute?

Finally, the Purcell Court states, "More importantly, *with the exception of actions based on federally created rights*, (FN3) we have not applied Code Sec. 8.01-243(A) to a cause of action which did not involve either mental or physical injury to the body. * * *" [Italics added] Retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e et seq.), because it is an action "based on federally created rights", is covered by Code Sec. 8.01-243(A). This federally created right -- even though it entails monetary damages -- is covered by Code Sec. 8.01-243(A). It therefore logically follows that causes of action involving monetary damages are not necessarily precluded from being covered by Code Sec. 8.01-243(A).

Actually, Mr. Clements' wrongful termination in violation of public policy action at bar is an action based on a federally created right; and the federally created right is that an employee has the right to complain of acts made unlawful by Title VII of the Civil Rights Act of 1964, as amended, without retaliation from his employer. An employer's terminating an employee in retaliation for his complaining of acts made unlawful by Title VII represents a violation of the Virginia Human Rights Act. Since Mr. Clements' wrongful termination in violation of public policy is an action based on a federally created right, Code Sec. 8.01-243(A) applies.

The Supreme Court of Virginia's history of not applying Code Sec. 8.01-243(A) to a cause of action "which did not involve either mental or physical injury to the body", with the exception of those federally created actions, is rendered irrelevent to the issue of whether or not Code Sec. 8.01-243(A)

applies to wrongful termination by the two **FATAL ERRORs** presented above.

B. Intentional Infliction of Emotional Distress Claim is Timely Filed:

"Under Virginia law, an action for emotional distress is an action for personal injuries carrying a two-year limitations period." Moore v. Allied Chemical Corp., 480 F.Supp. 364 (E.D.Va. 1979) at 365.

B&W fired Mr. Clements on September 21, 1992. Mr. Clements alleges intentional infliction of emotional distress in ¶ 12. and in "Plaintiff's Exhibit 5" of his Amended Complaint filed in the federal District Court on February 5, 1993; and in ¶¶ 33, 58, 89, 95, 118, 138, 139, 163, 164, 166, 168, 172, and 201 through 205 of his Second Amended Complaint filed in the federal District Court on June 28, 1994. Therefore, Mr. Clements' intentional infliction of emotional distress claim relating to the harassment in the course of employment and that relating to B&W's firing of him was timely filed in the federal court.

The latest act of intentional infliction of emotional distress by B&W in the continuing conspiracy to injure Mr. Clements took place on November 13, 1994, and was filed with the Appeals Court on September 29, 1995, the date of filing of his "Supplement To Informal Reply Brief of Appellant", pp. 1 through 3; and it was filed in this court on July 24, 1995 in ¶¶ 80 through 88. The intentional infliction of emotional distress relating to the November 13, 1994 incident is therefore also timely filed.

The federal District Court struck Mr. Clements' intentional infliction of emotional distress claim from his Second Amended Complaint on September 9, 1994. Mr. Clements then filed his intentional infliction of emotional distress cause of action with this Court on September 19, 1994, the date on which he filed his Motion for Judgment.

Because of Virginia's doctrine of equitable estoppel, the limitations period stopped running on February 5, 1993, the date Mr. Clements filed his intentional infliction of emotional distress claim with the federal District Court. It started running again on September 9, 1994, the date on which the federal District Court struck that claim from Mr. Clements' Second Amended Complaint. The limitations period then stopped again on September 19, 1994, the date on which Mr. Clements filed the claim with this Court.

In any event, Mr. Clements' allegation that the claims at bar are based on acts committed in furtherance of a continuing conspiracy makes all claims at bar timely: Mr. Clements alleges that B&W and others intentionally inflicted emotional distress on him in furtherance of a continuing civil conspiracy to injure him, in his complaint, amended complaint and second amended Complaint filed with the federal court; and in his motion for judgment and amended motion for judgment filed with this court. The date of the last two acts committed in furtherance of the continuing conspiracy are January 18, 1995 and January 4, 1995. Since Mr. Clements' claims at bar were filed on September 19, 1994, the date of filing of his Motion for Judgment, all claims at bar are timely.

C. Defamation Claim is Timely Filed:

1. Limitations Period for Defamation Claims: "Actions for defamation are actions for personal injuries for the purpose of the *two year* limitation period of § 8.01-243(A)." Via v. O'Donnell, 27 Va. Cir. 433 (1982) at 433 (Emphasis added). Judge Jack B. Coulter of the Circuit Court of the City of Roanoke supports his finding of two-year limitation period for defamation with a compelling argument in Via, a copy of which is included in the accompanying Appendix as Exhibit 12, for the convenience of the Court, and is part of Mr. Clements' argument in support of applying a two-year limitations period

to his defamation claims.

Mr. Clements joins Judge Coulter in his plea to higher courts where he says, "This Court cannot bring itself to depart from language and logic so plain and unambiguous nor read into the statute qualification or exception which the legislature has not provided - at least not until so directed by a higher court who, if so persuaded, will hopefully be able to demonstrate clearly the error of this analysis." Id. at 445.

Please note that the 1995 Amendment to the Virginia Code has added the new "§ 8.01-247.1. Limitation on action for defamation, etc.", which specifies a one-year limitation. The Virginia Legislature's adding this section suggests at the very least that a one-year limitation period for defamation was not universally accepted as the correct time limit. This supports Judge Coulter's finding. Please also note that § 8.01-247.1 does not apply to the case at bar, since Mr. Clements' defamation action pre-dates said 1995 Amendment.

2. Plaintiff's Defamation Claims Filed With This Court Are Timely:

The following are the defamatory communications made by the co-conspirator-defendants, a copy of which are attached to Mr. Clements' Second Amended Motion for Judgment:

a) Co-conspirators Pagans'/Grainger's/EACV's Defamatory Communications:

1) "Evaluation Progress and Review" notes ("Pagans notes"). Pagans/EACV communicated them to: B&W on or after March 6, 1990, the date of the last entry in said notes; to the DOE on or after March 6, 1990, the date of the entry in which Pagans states that he mailed the records to the VA; and to the DOE on or after March 6, 1991, the date on which defendant Slough had Mr. Clements sign a release of confidential information form to

enable the DOE to obtain a copy of Mr. Clements' records maintained by EACV;

2) EACV's MMPI Chart and "MMPI Interpretation" Pagans/EACV communicated them to B&W on or after February 4, 1990, the date of the entry in Pagans notes that states that EACV received the results of the MMPI test; to the VA on or after March 6, 1990, the date of the entry of said Pagans notes that states that Pagans mailed the records to the VA, and; to the DOE on or after March 6, 1991, the date that defendant Slough had Mr. Clements sign a release of confidential information form to enable him to obtain a copy of Mr. Clements' confidential file maintained by EACV.

3) Pagans'/EACV's February 22, 1990 Letter to B&W. Said letter was communicated to: B&W on or after February 22, 1990, the date of the letter; to the VA on or after March 6, 1990; to the DOE on or after March 6, 1991 ;

b) B&W's Defamatory Communications to the DOE. Mr. Clements states in ¶ 15 of his Amended Complaint filed with the federal District Court on February 5, 1993, "Plaintiff alleges that Defendant Company made statements to PNR that put Plaintiff's character and/or emotional stability into question * * * and that Defendant Company knew that these alleged statements made by Defendant Company to PNR, were false." Those defamatory communications that triggered the DOE's investigation of Mr. Clements were communicated to the DOE on or after September 1, 1990, since DOE's documentation states that defendant Tetrault contacted them in September, 1990 about Mr. Clements.

D. Tortious Interference with Current and Future Economic Relationships:

Tortious interference with economic relationships is a personal injury governed by Va. Code Section 8.01-243.

Therefore, the applicable limitations period is two years. The argument in support of Mr. Clements' assertion that tortious interference with economic relationships is governed by Va. Code Section 8.01-243 is the same as that for defamation and for wrongful termination in violation of public policy, presented herein.

Mr. Clements in substance alleges tortious interference with economic relationship in ¶¶ 8, 9, 10, 12, 14, 15, 16 of his Amended Complaint (See Def.Exh. 2). Since the Amended Complaint was filed in federal District Court on February 5, 1993 -- less than five months after B&W fired him -- Mr. Clements' tortious intereference with economic relationship was timely filed. Mr. Clements respectfully requests that this court take into consideration that he is not a lawyer, and therefore did not know how to properly state his claims in his Complaint and in his Amended Complaint filed in federal court.

Mr. Clements alleges tortious intereference with economic relationship in Count Eight (¶¶ 212 through 214) of his Second Amended Complaint (See Def.Exh. 3) filed with the federal court on June 28, 1994. Please note that in ¶ 214 Mr. Clements in substance refers to future economic relationships, as well. Since the filing date is well within the two-year limitations period, Count Eight was timely filed in federal court.

Mr. Clements alleges tortious interference with then existing and with future economic relationships in ¶¶ 2, 22, 51 and 52 of his Motion for Judgment, which was filed with this court on September 19, 1994 -- ten days after his state tort claims were dismissed by the federal District Court without determining the merits. Therefore, it is timely filed in this court.

E. Invasion of Privacy:

Va. Code Section 8.01-243 governs the personal injury

of invasion of privacy. Therefore, the applicable limitations period is two years. The argument in support of applying Va. Code Section 8.01-243 is the same as that applied to defamation and wrongful termination presented herein.

> * * * a strong argument can be made that, under Virginia law, a claim for either of these two types of invasion of privacy would not accrue until the plaintiff had knowledge of the publication of the allegedly offensive material because, until that time, a necessary element of the plaintiff's cause of action, the injury, would be missing. * * *

Brown v. American Broadcasting Co, Inc., 704 F.2d. 1296 (1983) at 1302

Mr. Clements filed his invasion of privacy claim with this Court on September 3, 1996 - the date on which the Court received his Second Amended Complaint. As alleged in ¶ 272 of his Second Amended Motion for Judgment, Mr. Clements did not learn of the invasion of his privacy until November 17, 1994. Therefore, his invasion of privacy claim is timely.

F. Civil (Common Law) Conspiracy:

Va. Code Section 8.01-243 governs the personal injury of common law conspiracy. Therefore, the applicable limitations period is two years. The argument in support of applying Va. Code Section 8.01-243 is the same as that applied to defamation and wrongful termination presented herein.

"Civil (Common Law) Conspiracy"; and Doctrines of "Continuing Violations", Fraudulent Concealment and "Equitable Tolling" Makes All Claims Timely:

Mr. Clements alleges in words or in substance that the defendants took part in a continuing conspiracy to injure him in retaliation for his having complained of acts made unlawful by Title VII, in his federal court Amended Complaint. See ¶ 12 of his Amended Complaint (Def.Exh. 2). Mr. Clements' Amended Complaint was filed with the federal District Court on February

5, 1993 -- well within one (1) year of B&W's firing him, which took place on September 21, 1992.

Mr. Clements alleges in words or in substance that the state torts at bar were acts of a conspiracy to injure him; and that they were continuing violations of discrimination, and were in retaliation for his having complained of acts made unlawful by Title VII, in his federal court Second Amended Complaint that was filed with the federal District Court on June 28, 1994. See ¶¶ 58, 78, 89 thru 99, 118, 138, 139 and 194 thru 200 of Second Amended Complaint (Def.Exh. 3). The state tort causes of action are formalized in ¶¶ 201 through 220. Please note that the defendants left out Mr. Clements' exhibits, some of which may be relevant to the issue of timeliness.

Mr. Clements alleges that the state torts at bar were acts in furtherance of a conspiracy to injure him; and that they were continuing violations of discrimination, and were in retaliation for his having complained of acts made unlawful by Title VII, in ¶¶ 2, 22 and elsewhere in his Motion for Judgment filed with this Court on September 19, 1994. He also alleges in words or in substance that the state torts at bar were acts of a conspiracy to injure him; and that they were continuing violations of discrimination and in retaliation for his having complained of acts made unlawful by Title VII, in ¶¶ 2, 22, and elsewhere in his Amended Motion for Judgment filed with this Court on July 24, 1995; and also in his Second Amended Motion for Judgment.

1. Civil (Common Law) Conspiracy:

a. "Civil Conspiracy" Defined: "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, not in itself criminal or unlawful, by criminal or unlawful means. *Werth v. Fire Adjust, Bureau*, 160 Va. 845, 855, 171 S.E. 255, 259, *cert. denied*, 290 U.S. 659, 54 S.Ct. 74, 78 L.Ed. 570 (1933)." Hechler Chevrolet, Inc. v. General

Motors, 337 S.E.2d 744 (Va. 1985).

"Although a civil conspiracy may consist of concerted action to accomplish 'an unlawful or oppressive object, or a lawful object by unlawful or oppressive means' the use of the word 'unlawful' does not necessarily connote criminal. 'Unlawful' means without authority of law; that which is not justified or warranted by law. It does not necessarily mean contrary to some statute or to the common law, but means 'unauthorized by law;' it does not necessarily mean contrary to law, but means not authorized by law or the infringement of the moral law and not necessarily of the civil law. * * *" Bull v. Logetronics, Inc., 323 F.Supp. 115 (1971) at 134.

b. Effect of "Civil Conspiracy" on Timeliness: Civil conspiracy has the effect of tolling the start of the running of the limitations period for all causes of action carried out in furtherance of the conspiracy to the date of the last act committed in furtherance of the conspiracy. "Because it appears this action was filed within three years of the last overt act of what may have been a continuing conspiracy..., we cannot say that any claim stated in the complaint is barred by the three-year statute of limitations." White v. Bloom, 621 F.2d 276 (1980) at 281. "Where plaintiff alleged continuing conspiracy to deprive him of his civil rights and where complaint was filed within year of last overt act alleged in complaint, none of the individual components of plaintiff's conspiracy claim was barred by any Texas statute of limitations." Slavin v. Curry, 574 F.2d 1256 (1978) at 1257.

2. Effect of "Continuing Violations" Doctrine on Timeliness:

"* * * if at least one of a series of separate acts falls within the statutory period, 'the effect . . . is to sweep within the limitations period the earlier alleged acts of discrimination.' *Bradley v. Carydale Enterprises*, 707 F.Supp. 217, 222 (E.D.Va.1989)(Suit under 42 U.S.C. § 1981)." NAACP Labor

Committee v. Laborers' Intern. Union, 902 F.Supp. 688 (W.D.Va. 1993) at 706.

Mr. Clements alleges in his federal court Amended Complaint that the defendants committed unlawful acts of intentional infliction of emotional distress, defamation, tortious interference with economic relationship, retaliatory discharge and wrongful termination in violation of public policy in retaliation for his having complained of acts made unlawful by Title VII. An employer's retaliating against an employee in the course of employment because of the employee's having complained of acts made unlawful by Title VII is itself unlawful by Title VII. B&W fired Mr. Clements on September 21, 1992. The EEOC issued its "Notice of Right to Sue" relating to Mr. Clements' retaliatory discharge claim on April 13, 1994. Mr. Clements filed his retaliatory discharge claim on June 28, 1994 via his Second Amended Complaint. Since the filing date is well within the 90 days' limitation period specified by the "Notice of Right to Sue", Mr. Clements' retaliatory discharge claim was timely filed by a margin of fourteen (14) days. Since at least one of the alleged acts was timely filed, all other claims in Mr. Clements' federal action were timely filed, as well.

3. Effect of "Equitable Estoppel" Doctrine on Timeliness:

"...the Virginia Supreme Court has required intentional conduct to allow the doctrine [of equitable estoppel] to toll the running of a statute of limitations. The court held that '... A defendant must intend to conceal the discovery of the cause of action by trick or artifice and must have thus actually concealed it from the plaintiff in order for the exception to apply.' *Richmond Redev. & Hous. Auth. v. Laburnum Constr. Corp.*, 195 Va. 827, 840, 80 S.E.2d 574, 582 (1954)." F.D.I.C. v. Cocke, 7 F.3d 396 (4th Cir. 1993) at 402 (Brackets and their contents added).

"The statute of limitations in a tort action begins to run ordinarily from the date of the injury, and the mere lack of knowledge of the actionable wrong ordinarily does not suspend the running of the statute of limitations, nor does the silence of the wrongdoer, ***unless he or she has done something to prevent discovery of the wrong.*** *State ex. rel. Ashworth v. State Road Commission*, 147 W.Va. 430, 437, 440, 128 S.E.2d 471, 476, 478 (1962)." Sattler v. Bailey, 400 S.E.2d 220 (W.Va. 1990) at 227 (Emphasis added).

a. The Start of Running of Limitations Period For All Claims Is Tolled To January 18, 1995:

To the best of Mr. Clements' knowledge, the conspirators' last act committed in furtherance of the continuing conspiracy occurred on January 18, 1995 -- the date that Conner knowingly made a false statement during the taking of his deposition as part of his discovery in Mr. Clements' federal suit.. Specifically, when Mr. Clements asked Conner, "* * * Did PNR conduct any investigations of me that were not routine scheduled investigations?", to which Conner responded, "Not that I'm aware of, Chip." (PL.Exh. 5 at 7). Clements also asked Conner, "* * * Have you ever played a role in initiating a PNR investigation of a B&W employee that was not a routine DOE investigation?", to which Conner responded, "Not that I'm aware of." (PL.Exh. 5 at 9), even though the defendants state in ¶ 105 of their answer to the Second Amended Complaint, "* * * Defendants admit that Defendant Conner told Plaintiff that Pittsburgh Naval Reactors (PNR) was going to conduct an investigation.".

Conner's making the aforementioned false statement during the taking of his deposition caused injury to Mr. Clements in that it had the effect of obstructing his discovery. Mr. Clements was obstructed from discovering Conner's knowledge relating to the retaliatory PNR investigation of him

that B&W had initiated.

And, since Conner's obstruction of discovery was an act of the continuing conspiracy to injure Mr. Clements, the start of running of limitations period for all of Mr. Clements' causes of action at bar is tolled to January 18, 1995.

Mr. Clements' allegation of Conner's obstruction of discovery is stated on Page 4 of his "Supplement No.3 To Informal Reply Brief of Appellant", which was filed with the United States Court of Appeals for the Fourth Circuit ("Appeals Court") on November 7, 1995. Since Mr. Clements' state tort claims were filed in federal District Court on June, 28, 1994 (filing date of Second Amended Complaint), all of those claims are timely with respect to his federal action.

Further, all of Mr. Clements' state tort claims filed in this court are timely: B&W fired Mr. Clements on September 21, 1992. The federal District Court struck Mr. Clements' intentional infliction of emotional distress, defamation, tortious interference with economic relationship and wrongful termination in violation of public policy claims with its Order filed September 9, 1994 (See D.E. 33). Mr. Clements filed his Motion for Judgment containing his state torts with this court on September 19, 1994. Therefore, since his filing date is actually before the date of occurrence of the last alleged act of the continuing conspiracy, all claims at bar are timely. ***Or***;

b. The Start of Running of Limitations Period For All Claims Is Tolled To January 4, 1995:

January 4, 1995 is the date of counsel for defendants' letter to Mr. Clements in which the defendants admitted that the "MMPI INTERPRETATION" purportedly signed by Sloop, and related MMPI Chart were missing from the confidential records of Mr. Clements maintained by both EACV and by Sloop (Mr. Clements filed a copy of said letter with the federal District Court as "EXHIBIT O" of SUPPLEMENT TO

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR THE COURT TO...COMPEL on 1/9/95). Mr. Clements subpoenaed EACV to produce the MMPI test-related documents because he suspects that they were fraudulent. Removal of those documents from Mr. Clements' record constitutes a violation of § 54.1 of the Code of Virginia (Mr. Clements alerted the federal Appeals Court of this in Section II.D. on Pages 5 through 8 of INFORMAL REPLY BRIEF OF APPELLANT filed on August 23, 1995).

Removal of the documents from his confidential file caused injury to Mr. Clements in that it obstructed his discovery. Mr. Clements was going through the process of obtaining temporary possession of the original MMPI test-related documents to have them tested for authenticity, as allowed by Fed. R. Civ. P., Rules of Evidence, Rule 901. The mysterious disappearance of said documents prevented Mr. Clements determining whether or not they were authentic.

If the MMPI test-related documents are fraudulent, that fact would serve to support all of Mr. Clements' claims at bar. Since all of the claims are affected, and for the same reasoning in Section A.1., *supra.*, the start of running of limitations period for all of Mr. Clements' causes of action at bar is tolled to January 4, 1995.

Mr. Clements' allegation of EACV's obstruction of discovery is stated on Page 4 of his "Supplement No.3 To Informal Reply Brief of Appellant", which was filed with the Appeals Court on November 7, 1995, well within one year of the date of occurrence of EACV's obstruction of discovery (Fl.Exh. 10). Since Mr. Clements' state tort claims were filed in federal District Court on June, 28, 1994 (filing date of Second Amended Complaint), all of those claims are timely with respect to his federal action.

Further, all of Mr. Clements' state tort claims filed in this court are timely: B&W fired Mr. Clements on September

21, 1992. The federal District Court struck Mr. Clements' state tort claims with its Order filed September 9, 1994 (See D.E. 33). Mr. Clements filed his Motion for Judgment containing his state torts with this court on September 19, 1994. Therefore, since his filing date is actually before the date of occurrence of EACV's obstruction of discovery -- which is an act of the continuing conspiracy -- all claims at bar are timely. ***Or***;

c. The Start of Running of Limitations Period For All Claims Is Tolled To November 13, 1994:

The start of running of limitations period for all claims is tolled to November 13, 1994, which is the date of occurrence of the incident of continued harassment, retaliation and intentional infliction of emotional distress described in ¶¶ 80 thru 88 of Amended Motion for Judgment; and in ¶¶ 169 through 178 of his Second Amended Motion for Judgment. This was an act of the continuing conspiracy by B&W and co-conspirators to injure Mr. Clements.

4. Effect of Fraudulent Concealment Tolling Doctrine on Timeliness:

Mr. Clements alleges in his Second Amended Motion for Judgment that co-conspirator Employee Assistance of Central Virginia, Inc. ("EACV") removed from his confidential record maintained by EACV confidential documents and destroyed them. Defendants admit in the John Geier/Clyde Clements letter of January 4, 1995 that a condidential document is no longer at EACV (Pl.Exh. 4). This represents fraudulent concealment, which has the effect of tolling all of the acts committed in furtherance of the conspiracy to injure Mr. Clements to January 4, 1995.

5. Effect of Federal District Court's Dismissal of Plaintiff's State Tort Claims on Timeliness of His Claims Filed with This Court:

"* * * if any action is commenced within the prescribed

limitation period and for any cause abates or is dismissed *without determining the merits*, the time such action is pending shall not be computed as part of the period within which such action may be brought, and another action may be brought within the remaining period." (Emphasis added) Va. Code Ann. § 8.01-229 (Michie 1995).

The federal District Court dismissed Mr. Clements' state tort claims without determining their merits on September 9, 1994 (D.E.33). On September 19, 1994 Mr. Clements filed those claims in this court via his Motion for Judgment. Therefore, only ten (10) days elapsed between the federal court's dismissing his state tort claims and Mr. Clements' filing them in this court.

III. PLAINTIFF ALLEGES SUFFICIENT FACTS IN HIS SECOND AMENDED MOTION FOR JUDGMENT TO CREATE VIABLE CAUSES OF ACTION AS A MATTER OF LAW:

A. Count One - Intentional Infliction of Emotional Distress:

Virginia recognizes intentional infliction of emotional distress as an independent tort action. "Emotional distress resulting from nontactile tort, such as intentional infliction of emotional distress, may be compensated if plaintiff alleges and proves by clear and convincing evidence, that: wrongdoer's conduct is intentional or reckless; conduct is outrageous and intolerable; alleged wrongful conduct and emotional distress were causally connected; and stress is severe." Russo v. White, 400 S.E.2d 160 (Va. 1991) at 160.

1. First Prong - "Wrongdoer's Conduct Is Intentional or Wreckless":

Mr. Clements alleges that the defendants' conduct was intentional in ¶¶ 26, 32 thru 35, 38 and 40 thru 44 of his Motion for Judgment filed with this Court on September 19, 1994; in

¶¶ 29 thru 36, 42, 61, 62, 69 thru 73, 78 thru 88, and 113 thru 117 of his Amended Motion for Judgment filed with this Court on July 24, 1995; and in ¶¶ 22, 23, 133, 134, 147, 168, 169, 193, 215, 216 and elsewhere in his Second Amended Motion for Judgment ("2d.Am.M.J.") received by the Court on September 3, 1996..

2. Second Prong - "Conduct Is Outrageous and Intolerable":

"* * * The extreme and outrageous nature of the conduct may arise not so much from what is done as from abuse by the defendant of some relation or position which gives the defendant actual or apparent power to damage the plaintiff's interests. * * *" Prosser and Keaton on Torts, (5th ed., 1988), § 12. Infliction of Mental Distress, *Extreme Outrage*, at 61.

B&W, by its being Mr. Clements' employer had actual power to damage Mr. Clements' interests. Mr. Clements alleges in ¶¶ 22, 64, 65 and elsewhere in his 2d.Am.M.J. that B&W sent him to EACV in retaliation for his complaining of acts made unlawful by Title VII. Mr. Clements alleges in ¶¶ 131, 132 and elsewhere in his 2d.Am.M.J. that B&W knew that his allegations of bizarre harassment and retaliation were true and accurate even before Tetrault sent Mr. Clements to EACV purportedly for counseling because of the bizarre nature of his allegations.

Further, Mr. Clements alleges in ¶¶ 22, 23, 139, 141, 142, 148, 149 and elsewhere in his 2d.Am.M.J. that B&W initiated the unscheduled DOE investigation of him in retaliation for his complaining of unlawful harassment and retaliation; and that B&W knew that his allegations of unlawful harassment and retaliation were true and accurate at the time B&W initiated the unscheduled DOE investigation of him.

"* * * Still another basis on which extreme outrage can be found is the defendant's knowledge that the plaintiff is especially sensitive, susceptible and vulnerable to injury

through mental distress at the particular conduct. * * *" Id. at 62. "* * * There are, however, a few cases which indicate that liability for extreme outrage is broader and extends to situations in which there is no certainty, but merely a high degree of probability that the mental distress will follow, and the defendant goes ahead in conscious disregard of it. * * *" Id. at 64.

Mr. Clements alleges in ¶¶ 64, 69, 215 and elsewhere in his 2d.Am.M.J. that B&W knew that Mr. Clements had served in combat in Vietnam at the time B&W made arrangements for Mr. Clements to go to EACV; and, therefore, at the time it initiated the DOE's unscheduled investigation of him. Mr. Clements alleges in ¶ 69 of his 2d.Am.M.J. that B&W claimed that Mr.Clements' Vietnam veteran status had something to do with its sending him to EACV; and in ¶¶ 131 through 134 and elsewhere Mr. Clements alleges that the defendants knew that Mr. Clements' allegations of bizarre harassment and retaliation by the defendants was true at the time B&W sent him to EACV; and at the time B&W initiated the unscheduled DOE investigation of him. In ¶¶ 215 through 218 and elsewhere in his 2d.Am.M.J. he alleges that the defendants knew or should have known that Tetrault's telling him, "I think you think these things are going on because of your Vietnam experiences."; B&W's sending him to EACV purportedly for counseling; and Tetrault's personally taking part in the bizarre harassment of him after he had said to Mr. Clements, "I think you think these things are going on because of your Vietnam experiences." would likely result in severe emotional distress; that defendants' conduct was intentional, outrageous and evinced actual malice, ill will and conscious disregard for his mental and emotional health.

3. Third Prong - "Alleged Wrongful Conduct and Emotional Distress Were Causally Connected":

Mr. Clements alleges in ¶¶ 134, 219 and elsewhere in his 2d.Am.M.J. that the alleged wrongful conduct and the severe emotional distress he has experienced were causally connected.

4. Fourth Prong - "Stress Is Severe":

Mr. Clements alleges in ¶¶ 134, 139, 215, 216, 219 and elsewhere in his 2d.Am.M.J. that the stress was severe. "* * * the trial court must initially determine whether the facts alleged will support a finding of both outrageous and severe emotional distress." Russo at 162.

B. Count Two - Defamation:

Mr. Clements' allegations of false and defamatory statements by the defendants are pled with sufficient specificity in ¶¶ 221 through 249 and elsewhere in his 2d.Am.M.J.

Mr. Clements alleges in ¶¶ 72, 109, 222 and elsewhere in his 2d.Am.M.J. that defendant Pagans induced him to sign the EACV "Authorization for Release of Confidential Information" form under the false pretenses that his signature was needed on said form so Pagans could contact B&W about getting B&W's agreement to pay for the MMPI test that he was going to take; and that neither EACV nor B&W ever told him that EACV was going to disclose to B&W information from his confidential record maintained by EACV.

Mr. Clements alleges in ¶¶ 96 through 103, 223 and elsewhere in his 2d.Am.M.J. that EACV disclosed to B&W information from his confidential record maintained by EACV; and that said disclosure is in direct violation of B&W and EACV's policies and representations they make to B&W employees who go to EACV that all contact with EACV is strictly confidential. Therefore, the EACV "Authorization for Release of Confidential Information" that Pagans induced Mr. Clements to sign on January 16, 1990 under false pretenses does not represent Mr. Clements' expressed consent for EACV to disclose to B&W information from his confidential record

maintained by EACV. Said release form is rendered null and void.

1. Qualified Privilege is Lost:

> Unlike some jurisdictions, Virginia does not permit a qualified privilege to be defeated upon a showing of mere negligence. We require proof of common-law malice, that is, behavior actuated by motives of personal spite, or ill-will, independent of the occassion on which the communication was made. * * *

Gazette, Inc. v. Harris, 325 S.E.2d 713 (Va. 1985) at 727.

> * * * the [qualified] privilege was lost if the jury found, from a preponderance of the evidence, that the alleged words were spoken: * * * With actual malice; or * * * even though believing the alleged words to be true, he used language which was intemperate or disproportionate in strength and violence to the occasion and which was unnecessarily defamatory of the plaintiff; or * * * Not in good faith, and without an honest belief in their truth; or * * * For the purpose of gratifying some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff; or * * * With such gross indifference or recklessness as to amount to a wanton and wilful disregard of the rights of the plaintiff; then the defendant abused the privilege which might otherwise have attached to the occassion. * * * common-law malice is shown, sufficient to defeat a qualified privilege, by proof that the speaker uttered defamatory words without believing them to be true, or lacked reasonable or probable grounds for believing them to be true.
>
> Brackets and their contents added.

Great Coastal Exp., Inc. v. Ellington, 334 S.E.2d 846 (Va. 1985) at 853, 854.

Mr. Clements alleges in ¶¶ 22, 23, 37, 39, 40, 43, 44, 64, 65, 67, 72, 75 through 108, 115, 129, 130, 139, 209, 226, 233, 240, 247 and elsewhere in his 2d.Am.M.J. facts imputing to defendants: motives of personal spite, and ill-will, independent of the occasions on which the communications were made; motives of actual malice, desire to injure Mr. Clements, conscious disregard for his rights, and; knowledge that the communications were false.

Virginia recognizes defamation by implication: "...'a defamatory charge may be made by inference.' *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 7, 82 S.E.2d 588, 592 (1954)." Schnupp v. Smith, 457 S.E.2d 42 (Va.1995) at 46. "...a defamatory charge may be made by inference, implication or insinuation. *James v. Powell*, 154 Va. 96, 152 S.E. 539;..." Carwile v. Richmond Newspapers, 196 Va. 1 at 7.

C. Count Three - Tortious Interference with Then Existing Economic Relationship and with Future Economic Relationships:

"The requisite elements required for a prima facie showing of a tortious interference with a contract that is *not* terminable at will are: '(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.' * * * when a contract is *terminable at will*, a plaintiff, in order to present a prima facie case of tortious interference, must allege and prove not only an *intentional* interference that caused the termination of the at-will contract, but also that the defendant employed '*improper* methods.' *Hechler Chevrolet*, 230 Va. at 402, 337 S.E.2d at 748 * * * Methods of interference considered improper are those means that are illegal or independently tortious, such as violations of

statutes, regulations, or recognized common-law rules. * * * Improper methods may include * * * threats or intimidation * * * fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information * * * " Duggin v. Adams, 360 S.E.2d 832 (Va. 1987) at 835, 836.

1. First and Second Elements:

It is an undisputed fact that Mr. Clements was employed full-time by B&W in the capacity of engineer under an at-will contract for approximately eight years. Therefore, a valid at-will employment contractual relationship between Mr. Clements and B&W existed; and both had knowledge of it.

2. Third Element:

Mr. Clements alleges that the defendants entered into a conspiracy to interfere with his economic relationship with B&W in ¶¶ 51 thru 52 of his Motion for Judgment; in ¶¶ 73, 78, and 121 thru 123 of his Amended Motion for Judgment; and in ¶¶ 2, 22, 23, 252, 253 and elsewhere in his 2d.Am.M.J.

3. Fourth Element:

It is an undisputed fact that B&W fired Mr. Clements on September 21, 1992. Mr. Clements alleges in ¶ 55 of his Motion for Judgment; in ¶ 125 of his Amended Motion for Judgment; and in ¶¶ 2, 23, 259 and elsewhere in his 2d.Am.M.J. that B&W fired him in retaliation for complaining of acts made unlawful by Title VII.

Mr. Clements alleges in ¶¶ 251 and 252 of his 2d.Am.M.J. that he had a valid at-will contractual relationship with B&W; and that B&W tortiously interfered with said contractual relationship by unlawfully firing him.

Mr. Clements alleges in ¶¶ 140 and 163 of his 2d.Am.M.J. that B&W fired him on September 21, 1992 without warning; i.e., without notice. B&W did not give him notice that B&W was going to terminate his employment. B&W states in its Disciplinary Report signed and dated on

September 21, 1992, "On the basis of your conduct, as summarized above, your employment with Babcock & Wilcox, NNFD, is being terminated, effective immediately." See Pl.Exh. 2 at 2.

B&W's firing Mr. Clements without notice represents breach of the then existing valid at-will employment contract; and is actionable under Mr. Clements' Tortious Intereference claim, since tortious interference with an economic relationship includes breach of a valid at-will employment contract.

> Lastly, the Court overrules the demurrer of Loral to the count alleging failure to provide reasonable notice of termination. The employment at-will doctrine in Virginia provides that either party is ordinarily at liberty to terminate the contract at will, upon giving the other party reasonable notice. The court interprets this language as defining an implied obligation requiring each party to an employment relationship to give the other reasonable notice of termination unless there is an agreement or understanding to the contrary. * * * Failure to give such notice is actionable as a breach of an implied contract.

Laudenslager v. Loral, Law No. 95-878 (See Pl.Exh. 13 at 2)

4. Additional Element Applicable to At-will Employment Contracts:

Mr. Clements alleges in ¶¶ 2, 22, 23, 214 through 249, 260 through 281 and elsewhere in his 2d.Am.M.J. that the defendants used the following "improper methods" of interference with his economic relationship with B&W: intimidation; misrepresentation; deceit; defamation; duress; undue influence; misuse of inside and confidential information; intentional infliction of emotional distress; invasion of privacy; and common law conspiracy.

Tortious interference with a terminable at-will implied

contract includes wrongful termination in violation of Virginia's public policy represents tortious interference with prospective future economic relationships *per se*, for the following reason: The unlawful firing of an employee, by its very nature tortiously interferes with any future economic relationships. The employee cannot lie on an application for prospective employment; nor during a pre-employment interview when the inevitable question is asked, "Why did you leave your last job?" It therefore logically follows that an employer's unlawfully firing an employee represents tortious intereference with future economic relationships, per se.

D. Count Four - Wrongful Termination in Violation of Public Policy:

Mr. Clements alleges in ¶ 55 and elsewhere in his Motion for Judgment; in ¶ 125 and elsewhere in his Amended Motion for Judgment; and in ¶¶ 2, 258 and elsewhere in his 2d.Am.M.J. that he was fired by B&W in retaliation for complaining of sexual harassment, discrimination and related retaliation in the course of employment; and that said retaliatory firing is in violation of Title VII of the Civil Rights Act of 1964, as amended, the policies underlying the public policy of the Commonwealth of Virginia and the Virginia Human Rights Act.

The Virginia Human Rights Act states, in part, "Conduct which violates any Virginia or *federal* statute or regulation governing discrimination on the basis of * * * sex * * * shall be an 'unlawful discriminatory practice' for the purposes of this chapter. * * * The provisions of this chapter shall be construed liberally for the accomplishment of the policies herein. * * *" Italics added.

Section 2000e-3(a) [Section 704] of Title VII of the Civil Rights Act of 1964, as amended, states, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any

practice made an unlawful act by this subchapter, or because he has participated in any manner in an investigation, proceeding, or hearing under this subchapter." An employer's firing an employee in retaliation for his complaining to the employer and to the EEOC of sexual harassment, discrimination and of related retaliation in the course of employment is therefore defined as a form of discrimination by federal statutes.

An employer's firing an employee for complaining of sexual harassment, discrimination and related retaliation in the course of employment is defined by Section 2000e-3(a) [Section 704] of Title VII of the Civil Rights Act of 1964 as an unlawful discriminatory practice. Discrimination on the basis of sex includes sexual harassment. It therefore logically follows that an employer's firing an employee for complaining of sexual harassment and of related retaliation in the course of employment is defined as a form of discrimination on the basis of sex by the federal statutes governing discrimination on the basis of sex.

The Virginia Human Rights Act includes federal statutes governing discrimination on the basis of sex. As demonstrated above, the federal statutes governing discrimination on the basis of sex includes an employer's firing an employee in retaliation for his complaining of sexual harassment and of related retaliation in the course of employment. It therefore logically follows that an employer's firing an employee in retaliation for his complaining of sexual harassment and of related retaliation in the course of employment is in violation of the Virginia Human Rights Act. As stated above, the Virginia Human Rights Act states that its provisions shall be liberally construed.

An employer's firing an employee for his complaining to the employer and to the EEOC of sexual harassment, discrimination and of related retaliation in the course of employment is in violation of Virginia common law as set forth

in Lockhart v. Commonwealth Educational Systems Corp., 247 Va. 98, 443, S.E.2d 428 (1994).

> In *Bowman*, we recognized the plaintiffs' rights to bring actions for wrongful discharge based upon violations of Virginia's public policy that a stockholder should be permitted to exercise the right to vote stock free of duress and intimidation from corporate management. Here, however, we are concerned with rights of even greater importance, the personal freedom to pursue employment free of discrimination based upon race or gender. Indeed, there are few, if any, greater restrictions on personal freedoms that an employee can suffer than to be terminated because of discrimination based upon race or gender.

Lockhart v. Commonwealth Educ. Systems Corp., 439 S.E.2d 328 (Va. 1994) at 331

Chesapeake Circuit Judge Russell I. Townsend, Jr. allowed a retaliation claim to be brought under Lockhart. The case is Laudenslager v. Loral, Law No. 95-878. For the convenience of the Court, a copy of Chesapeake Circuit Judge Russell I. Townsend, Jr.'s ruling on defendants' demurrers dated May 6, 1996 is included in the accompanying Appendix (See Pl.Exh. 13) . Laudenslager alleges that he was fired in retaliation for his refusal to participate in racial discrimination. Judge Townsend states, "This Court concludes from the language in the Lockhart case that at the time the opinion was rendered there was a cause of action in Virginia for wrongful discharge where an employee was terminated in retaliation for the employee refusing to participate in and opposing racially discriminatory practices and procedures." (See Pl.Exh. 13 at 1).

> Plaintiff's loss of her employment gives rise to a cause of action under the public policy exception to Virginia's employment at will doctrine, not because she has a

vested right to continued employment by Defendants, but because Defendants have abused their rights and authority by intentionally discriminating against Plaintiff on the basis of gender.

Dowdy v. Bower, 37 VA. CIR. 432 (1995) at 435, 436.

Plaintiff stated a cause of action for retaliatory discharge based on the public policy exception to the employment at-will doctrine where he alleged that he was discharged in retaliation for having reported instances of alleged sexual harassment of female employees by plaintiff's supervisor. Fielder v. Southco, Inc., 699 F. Supp. 577 (W.D. Va. 1988).

Master and Servant § 7 (Michie 1992).

Defendants claim that the time between Mr. Clements' initial complaint of sexual harassment and B&W's firing him "demonstrates that there was no nexus between the discharge and plaintiff's complaint concerning Boykan's unbuttoned blouse." (See Memorandum of Law in Support of Defendants' Plea in Bar and Demurrer at 20). Defendants continue to ignore the fact that the EEOC, in its Letter of Determination dated February 23, 1994 (See Pl.Exh. 3), documented that the EEOC found in the record proof of prima facie retaliatory discharge; and that B&W's Disciplinary Report (See Pl.Exh. 2) is the causal connection between Mr. Clements' complaining of acts made unlawful by Title VII and B&W's firing him. Further, as documented by the date of July 30, 1992 on the EEOC's Letter of Determination relating to Mr. Clements' sexual harassment charge (Pl.Exh. 1) and the date of September 21, 1992 on B&W Disciplinary Report (Pl.Exh. 2), there is less than two months' time between B&W's receiving said EEOC's Letter of Determination dated July 30, 1992 and its firing of Mr. Clements.

B&W proffers disloyalty as its reason for firing Mr. Clements. Mr. Clements alleges facts in ¶¶ 166, 167, 180

through 195 and elsewhere in his 2d.Am.M.J. in support of his assertion that B&W's proffered reason of "disloyalty" is a pretext. The record of Mr. Clements' federal suit contains his evidence of pretext, as well. See Transcript of Motions Hearing, Pl.Exh. 6 at 29 through 35.

At any rate, determination of the merits of Mr. Clements' wrongful termination claim before discovery, and before the litigants have filed with the Court their evidence obtained from their discovery efforts, would be inappropriate.

E. Count Five - Invasion of Privacy:

Mr. Clements' research has not revealed any Virginia case law that specifically rules out invasion of privacy as a cause of action. In the case that a common law action for invasion of privacy does not yet exist in Virginia, Mr. Clements respectfully requests that this Court consider recognizing this theory of recovery via the case at bar. Facts in support of his invasion of privacy claim are alleged in ¶¶ 71, 72, 90 through 93, 95 through 116, 262 through 274 and elsewhere in his 2d.Am.M.J.

F. Count Six - Civil (Common Law) Conspiracy:

Mr. Clements alleges that the state torts at bar were acts in furtherance of a common law conspiracy to injure him; that they were continuing violations of discrimination, and were in retaliation for his having complained of acts made unlawful by Title VII, in ¶¶ 2, 22 and elsewhere in his Motion for Judgment; in ¶¶ 2, 22, and elsewhere in his Amended Motion for Judgment; and also in ¶¶ 2, 22, 23, 92, 114 115, 157, 178, 275 through 281 and elsewhere in his 2d.Am.M.J.

> A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. *Werth v. Fire Adjust. Bureau*, 160

Va. 845, 855, 171 S.E. 255, 259, *cert. denied*, 290 U.S. 659, 54 S.Ct. 74, 78 L.Ed. 570 (1933).

Hechler Chevrolet, Inc. v. General Motors, 337 S.E.2d 744 (Va. 1985) at 748.

> A common law conspiracy consists of two or more persons combined to accomplish, by some concerted action, some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means. *Hechler Cheverolet v. General Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985) * * *. Emphasis added.

CBS v. Bellsouth Services, Inc., 453 S.E.2d 261 (Va. 1995) at 267.

Mr. Clements alleges facts of an agreement among the alleged co-conspirators; facts of personal gain by co-conspirators for their participation in the alleged conspiracy; facts of the co-conspirators' knowledge that their acts in furtherance of said conspiracy were malicious, unlawful and unethical, in ¶¶ 275 through 280 and elsewhere in his 2d.Am.M.J.

Finally, Mr. Clements case at bar is not frivolous, as demonstrated by the facts and arguments presented herein. "A pleading is 'frivolous' when it is clearly insufficient on its face, and does not controvert material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent. A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense. * * *" Black's Law Dictionary, (6th Ed.) at 668.

Therefore, Mr. Clements respectfully requests that the Court DENY defendants' request for sanctions against him.

CONCLUSION

For the reasons set forth above, Mr. Clements respectfully prays that this Court DENY defendants' Plea in Bar and Demurrer; and DENY defendants' request for sanctions against him.

dated September 17, 1996. Respectfully submitted,

s/ Clyde E. Clements, Jr.
Clyde E. Clements, Jr., Pro Se
Post Office Box 3391
Lynchburg, Virginia 24503
(804) 846-2521

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 1996, I caused one (1) true copy each of the foregoing Plaintiff's Memorandum of Law in Opposition to Defendants' Plea in Bar and Demurrer; and of Plaintiff's Appendix in Opposition to Defendants' Plea in Bar and Demurrer, to be served via U.S. First-Class mail upon Mr. Todd A. Leeson of FLIPPIN, DENSMORE, MORSE, RUTHERFORD & JESSEE, Drawer 1200, Roanoke, Virginia 24006, counsel for defendants.

s/ Clyde E. Clements, Jr.
Clyde E. Clements, Jr., Pro Se

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF CAMPBELL

CLYDE E. CLEMENTS, JR.,
Plaintiff,

v.

THE BABCOCK & WILCOX CO., INC., ET AL,
Defendants.

TRANSCRIPT OF PROCEEDINGS
THE HONORABLE J. MICHAEL GAMBLE PRESIDING

October 23, 1996
Amherst, Virginia

* * * *

EVANS & COMPANY
Court Reporters
Post Office Box 11822
(804) 239-2552

Reported by:TAMMY E. ROSENBAUM

Appearances:

CLYDE E. CLEMENTS, JR.
Pro se

CLINTON S. MORSE, ESQ.
Attorney for the Defendants

*
*
*

THE COURT: The order that he entered on September the 6th 1994 just said these - - those paragraphs, claims were stricken and that was it. He didn't really go into what he was doing or why he was doing it.

MR. MORSE: Your Honor, that's correct. And I can only say that we have attached as part of the exhibits in this case the briefs that were filed by the defendant that raised the issue on the merits, that being the statute of limitations, as well as whether or not a -- the plaintiff had stated a cause of action. And we also have included our brief to the forth circuit which show that we again argued those points. So I agree with you, the order is not -- does not set out any rational for the judge's decision, but the court papers that we have filed show that we did raise the issue that would have resolved those claims on the merits.

THE COURT: Did he make this -- and maybe another law firm was involved at that time for the defendants. But do you know if he -- did he make any rulings in court or did he just do this later on after the hearing; do you know?

MR. MORSE: Your Honor, I was not counsel for the Babcock and Wilcox, but if I can confer with my client just a moment --

THE COURT: Yes, you may, you certainly may.

MR. MORSE: Your Honor, I have counsel for Babcock and Wilcox with me, but he was not there either. So I can't represent to you whether he said anything one way or the other. It would generally be Judge Turk's practice not to rule at the time. And I'm inclined to think that he took it under advisement and issued his order subsequently.

(T 9, L 22 thru T 11, L 5)

*

*
*

THE COURT: All right. Mr. Clements?

MR. CLEMENTS: Yes, sir. My causes of action are not barred by the doctrines of raise judicata or by collateral estoppel, and all of my claims are timely.

The federal courts did not base their determinations on the merits of my claims. Quote, raise judicata means matter adjudged and it precludes relitigation of claim or issue once final determination on merits has been reached by court of competent jurisdiction, end quote. That's the Commonwealth of Virginia , Department of Social Services v. Johnson, 376 Southeast Second, 787, at 787. And the key point here, Your Honor, is that my retaliatory discharge claim was not dismissed on a determination of the merits.

And if you would, sir, if you could take a look at my Exhibit 8, Plaintiff's Exhibit 8, on page nine.

THE COURT: Are you speaking of the appendix or are you speaking --

MR. CLEMENTS: Yes sir. I'm sorry. The appendix. It has a tab number.

THE COURT: Tab eight?

MR. CLEMENTS: Tab eight, yes, sir, page nine.

THE COURT: All right.

MR. CLEMENTS: First sentence of the second paragraph, quote, more importantly plaintiff has not presented a shred of evidence other than bear allegations to meet his burden to show that B & W would not have terminated him, but for his claims with the EEOC. And on page ten, last sentence of the second paragraph, the federal court states, because plaintiff has presented no evidence other than the fact of his termination to show retaliatory intent he has failed to make our a prima facia case of -- excuse me -- a prima facia case of discrimination. And on page eleven, this is one -- my last point

here. The first sentence of second paragraph the district court states, finally as discussed above Clements has not presented a scintilla of evidence to show that B & W stated reasons for his discharge were merely a pretext.

The record of my federal court suit contains proof that those three statements are false. The first item is Babcock and Wilcox's disciplinary report that I filed with the court. I filed a copy of it as Attachment V to my second amended complaint. And I'm paraphrasing here; you have professed the following beliefs and made the following accusations against management in our writings, ten company employees including the president and general counsel as well as the division vice president and general manager, personnel manager, security manager, engineering manager, and others have harassed, discriminated against, retaliated against, and attempted to inflict severe emotional distress upon you; on the basis of your conduct as summarized above your employment with Babcock and Wilcox NNFD is being terminated effective immediately. The district court did not even mention this evidence in its memorandum opinion relating to its granting of defendant's motion for summary judgment.

The EEOC documented in its letter of determination dated February the 23rd 1994 -- and a copy of that is Plaintiff's Exhibit No. 3, tab number three. And they document that the EEOC fond that the Babcock and Wilcox's disciplinary report was the causal connection between Babcock and Wilcox's discharge of me and of my complaining of acts made unlawful by Title 7.

The last line on the first page of Exhibit 3 of the February 23rd 1994 EEOC determination states, charging parties discharge documents revealed that he was discharged in part for his accusations that management harassed, discriminated, and retaliated against him, the evidence of record that supports charging party's allegation that he was

discharged in part in retaliation for opposing practices made unlawful by Title 7. What the EEOC is saying is that I presented proof of prima facia retaliatory discharge.

The memorandum opinion of the federal district court relating to its granting of the defendant's motion for summary judgment does not even mention this causal connection. There is a genuine issue of material fact that should have come gone to trial, but it did not.

Please see Plaintiff's Exhibit No. 6 -- that's on tab six -- pages thirty-three and thirty-four, the very last line of page thirty-three. To the extent that my loyalty is an issue, Defendant Conner's deposition contradicts defendant's key assertion. This creates a genuine dispute of material fact, there being a question of fact that this issue must go to trial. Then I cite the lines of Mr. Conner's deposition in -- that's included in here as well -- tab five, page thirteen. This is the transcript of the Conner deposition. I asked him at line seventeen of page thirteen, do you have any reason to believe that I was a disordinate employee. Defendant Conner stated, no. He's the vice president and general manager of Babcock and Wilcox's Naval Nuclear Fuel Division.

So here we have Babcock and Wilcox claiming that I was fired for disloyalty. And Babcock and Wilcox is also saying that I was not a disloyal employee. That creates a genuine issue of material fact that should have gone to trial. I filed a copy of this deposition, and I made it clear to the court during the hearing of Babcock and Wilcox's motion for summary judgment, and the court did not even mention this in its memorandum opinion.

I also submitted evidence that Babcock and Wilcox gave me consent to write my letters. This is the conduct that Babcock and Wilcox claims was disloyal. Babcock and Wilcox knew about my letter writing. B & W never gave me a directive to stop my letter writing. B & W rewarded me with

only good to very good job performance evaluations. And for the duration of my letter writing B & W gave me raises and promotions presumably for good job performance and good conduct.

(T 15, L 18 thru T 20, L 10)

*
*
*

A brief summary is the federal district court made false statements, the statements that I pointed to in the transcript, that I had submitted no evidence in support of my retaliatory discharge claim. And then he dismissed my retaliatory discharge claim grounding it on his own false statements.

The federal court's dismissal of my other state tort claims were not grounded on a determination of the merits. The federal district court filed its order granting the defendant's motion to strike my state tort claims on September the 9th 1994. And as Your Honor has saw, there was no memoranda opinion, the judge gave absolutely no reason at all for striking my state tort claims.

The federal district court filed a stipulation and order setting the schedule for discovery on October the 20th 1994. Discovery had not even begun at the time the federal court dismissed my state tort claims. So it was literally impossible for anybody to claim that the federal court dismissed my claims based on the merits. We had not even started discovery.

The doctrine of collateral estoppel does not apply to the case at bar because the federal court denied me an opportunity to obtain a full and fair adjudication in the initial action. The defendant stated earlier that - - responded yes to your question did we have a full and fair opportunity to carry on discovery, and that is totally false. And the record bears that out.

THE COURT: Well, I'm just curious. I mean, I wasn't involved, but were - - did both sides take depositions and

file interrogatory questions?

MR. CLEMENTS: The defendants took no depositions. I filed - - I filed two sets of interrogatories and request for production of documents. I received the defendant's response, and there were numerous redactions. They gave me several pages that were just blank, complete redactions. They were vague in many questions, and, in fact, they even refused to send or did not send documents that I knew existed.

(T 22, L 23 thru T 24, L 12)

*

*

*

MR. CLEMENTS: * * * I filed my motion to compel, and I received a phone call from the defendant's attorney stating that they wanted a conference call with Judge Turk. And I didn't understand that, but I certainly don't know a lot about what I'm doing. I'm just doing the best I can. So I agreed to it. And I pointed out that I wanted to file a - - I can't recall exactly, but it had to do with my motion to compel. And I also asked Judge Turk if I could subpoena five people who should have knowledge of some documents that were unlawfully removed from my confidential record maintained by Employee Assistance of Central Virginia.

There was at least two documents relating to that MMPI Test that Employee Assistance of Central Virginia provided to two government agencies; the Department of Energy and the Veteran's Administration. Therefore, I knew they existed. I wanted to get the original because it's my right to test for authenticity. I questioned it. I was concerned that Employee Assistance of Central Virginia created the document. It was purportedly signed by E. Wayne Sloop, a psychologist in Lynchburg. I subpoenaed Employee Assistance of Central Virginia, and I subpoenaed Mr. Sloop. Neither one of them could produce those documents. So that's rather compelling

evidence, as I see it, that it was a fraudulent document. * * * **(T 25, L 6 thru T 26, L 6)**

*

*

*

* * * So back to that telephone conference with Judge Turk. I wanted to get to the bottom of this, and I was hoping that the court would cooperate with me and allow me to subpoena Sloop and his secretary and the counselor, Defendant Pagans, and Defendant Grainger who was the director of Employee Assistance of Central Virginia. This is a serious matter when documents are removed from my confidential file. And I was going to subpoena them in my motion to - - in my hearing of my motion to compel, but Judge Turk quashed my subpoenas before I had even served them.

I withdrew my motion to compel because the defendants were talking to Judge Turk about sanctions and I didn't know fully what that meant, but if it was a fine I certainly couldn't afford it at that time. I had had my job taken away from me. So I filed - - later I filed and served on the defendants my second set of interrogatories and request for production of documents.

After thirty days went by I still had no response. I allowed for roughly fifteen more days to go by, still no response. I filed my motion to - - my second motion to compel. On the same day Babcock and Wilcox filed its motion to stay discovery. And at that time the March 9th hearing of motions had already been set for the hearing of Babcock and Wilcox's motion for summary judgment. On March 7th Judge Turk granted Babcock and Wilcox's motion to stay discovery, thereby preventing - - denying me a hearing of my motion to compel. I was not given a full and fair opportunity to litigate my case.

The doctrine of collateral estoppel does not apply to the

case at bar because the federal courts denied me that opportunity to fully and fairly adjudicate.

And I have the dates here, Please stop me, sir, if you are already familiar with this. On January the 4th 1995 I filed with the district court my motion to extend time to complete my discovery. That's docket entry number forty-five. And I have the docket sheets filed as an exhibit, too. On or about January the 12th 1995 I served my second set of discovery requests on the defendants. That's docket entry dated January the 12th 1995. On January the 17th 1995 the Federal District Court filed its order denying me my motion for extended time to complete discovery. That's docket entry fifty-three. On March the 2nd 1995 I filed my motion to compel to answer my discovery requests. That's docket entry number fifty-nine.

In my motion I requested - - I specifically requested that my motion to compel be heard during the hearing of defendant's motion for summary judgment, which had already been set. On the same day B & W filed its motion to stay discovery, which is docket entry fifty-eight. On March 7th 1995 Judge Turk granted the motion to stay discovery, which is docket entry sixty-two, thereby denying me a hearing of my motion to compel. And the hearing of defendant's motion for summary judgment did take place on March the 9th, just two days later.

So clearly, Your Honor, the district court's dismissal of my retaliatory discharge claim and of my other state tort claims were not based on their merits. I was denied an opportunity to fully and fairly litigate my claims by the district court itself.

I appealed to the federal forth circuit, and the federal forth circuit's affirming on the reasoning of the district court was not based on the determination of the merits. Please see the Defendant's Exhibit No. 6. That's in their appendix. I'd like to point out something to the Court. Please note that this is an unpublished, unsigned opinion. And on page two it states, accordingly we affirm on the reasoning of the district court.

I have already pointed out today to the Court that there were at least two issues of material fact, genuine issues of material fact. They should have gone to trial, but they were not allowed to go to trial. The district court completely ignored that evidence in support of my claims. So I have wondered myself how could this happen. I filed a petition for rehearing with a suggestion for rehearing in bank. That also was denied.

Your Honor, I think it will help the Court understand that I brought the issues, the facts, and the relevant case laws squarely before the appeals court. And I'd like to file with the Court as Plaintiff's Exhibit No. 14 my petition for a writ of certiorari to the United States Supreme Court. And I have a copy for the defendants.

THE COURT: Any objection, Mr. Morse?

MR. MORSE: No objection.

THE COURT: Okay.

MR. CLEMENTS: I'd like to bring your attention to page twenty-seven A. And I won't take up the Court's time with a lot of detail at this point, but Your Honor will be able to see from my petition of appellate for rehearing with suggestion for rehearing in bank that I brought all of these genuine issues, materials, facts before the entire Forth Circuit Court of Appeals and they still denied it. * * *

(T 26, L 18 thru T 30, L 16)

*

*

*

MR. CLEMENTS: * * * All my claims are timely. If my state tort claims were timely filed in Federal Court, then they are timely filed in this Court because of Virginia's doctrine of epicable (phonetic) estoppel.

I filed my motion for judgment on September the 19th. Ten days before that on September the 10th was the day --

THE COURT: 1994?

MR. CLEMENTS: Yes, sir. Excuse me. Yes, sir.

On September the 10th 1994 the district court struck my state tort claims without giving any reason at law for doing so. Ten days later I filed them in the Circuit Court of Campbell County. So --

THE COURT: Is Mr. Morse correct that you filed your amended complaint with the additional claims in it in June of '94? Is that correct?

MR. CLEMENTS: In June of '94?

THE COURT: With the additional claims that were eventually stricken in September by the district court.

MR. CLEMENTS: I can find it quickly because I have the docket sheets. My second amended complaint was filed on June 28th 1994.

THE COURT: Okay.

(T 32, L 1-5)

*
*
*

MR. CLEMENTS: * * * So I filed my second amended complaint which included my formally stated state tort claims and my retaliatory discharge claim.

I alleged in my federal complaints and also in my motion for judgment in this Court conspiracy. And there is considerable case law -- one is White v. Blue, 621 F Second, 276 -- that states that the -- basically the clock begins to tick on the date of the last act committed in furtherance of the continuing conspiracy. And in order to determine that, it seems to me that an appropriate time to address the timeliness issue since I alleged conspiracy would be after discovery and after the evidence of my claims have been submitted to the Court. It seems that that's the way that the Court can reasonably determine if there is indeed conspiracy and also if my claims are timely.

I have one -- one of my better examples of unlawful acting continuance of the ongoing conspiracy is the defendant's removing documents from my confidential file maintained by Employee Assistance of Central Virginia, which is in violation of Section 54.1 of the Code of Virginia.

Plaintiff's Exhibit No. 4 -- that's tab number four of my appendix. This is the January the 4th 1995 letter from Mr. Guire, counsel for defendants. And he admits here that those documents that I subpoenaed Employee Assistance of Central Virginia for were no longer there. I allege that this is one of the several acts in continuance of the conspiracy to injure me.

The limitations period for each claim at bar is two years. Section 8.01-243 applies to all my claims at bar, which specifies a two-year limitations period for personal injuries. Intentional infliction of emotional distress, deformation, tortious interference with economic relationship, wrongful termination in violation of public policy, invasion of privacy, and common law are all personal injuries.

The Supreme Court of Virginia defines personal injury in Fuller v. Edwards, 22 Southeast Second 26 at 28. That's a 1942 case. And I include the Supreme Court of Virginia's definition of personal injury in my memorandum of law in opposition to defendant's plea and bar on page seventeen, and I will read from it. But when you look at the Fuller v. Edwards case, clearly all the claims at bar are governed by 8.01-243. **(T 34, L 1 thru T 35, L 20)**

*
*
*

The defendants have claimed that I have not claimed sufficient facts such that they are viable claims as a matter of law. Those are very general comments, and I would like to request that, if not today, if very soon in the near future, if they could be specific relating to my second amended motion for

judgment. I -- it's not clear to me whether the defendants were referring to my amended motion for judgment or to my second amended motion for judgment. He claims that I have not claimed specific or alleged specific facts in support of my deformation claim. If -- he could not have been referring to my second amended motion for judgment.

I think if one -- if the Court compares my deformation claim of my amended motion for judgment, you'll see, sir, that it's quite an improvement in my second amended motion for judgment. And I think that that would survive their demurrer. So once again, I'd like to ask the defendants if they could provide me with details as to why they think my claims at bar are not viable claims as a matter of law and base their comments on my second amended motion for judgment.

Also, I'd like to ask Your Honor if I may be given an opportunity to amend my second amended motion for judgment in the case if the Court believes that I have improperly or have not completely satisfied the requirements of each of my claims at bar as far as alleging allegations of facts.

(T 36, L 3 thru T 37, L 5)

*

*

*

THE COURT: Anything else you'd like to say, Mr. Clements?

MR. CLEMENTS: Yes, sir.

THE COURT: All right.

MR. CLEMENTS: Although an issue is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances; there is a clear and convincing need for a new determination of the issue because the party sought to be precluded as the result of special

circumstances did not have an adequate opportunity to obtain a full and fair adjudication in the initial action, restatement of the loss, second, judgments, second, Section 28, exceptions to the general rule of issue of preclusion at 273 and 274.

As I pointed out, it's an undisputed fact that the district court ignored genuine issues of material fact and also ignored other facts of record in support and specifically of my retaliatory discharge claim. Your Honor, there is no discrimination case -- there will never ever be a discrimination case that could survive that kind of attack from the federal court.

Thank you.

THE COURT: Okay.

Well, thank you for presenting your arguments and furnishing all these written materials. I will go through this and try and give you a decision within the next couple of weeks.

MR. MORSE: Thank you, Your Honor.

MR. CLEMENTS: Thank you, Your Honor.

(T 41, L 4 thru T 42, L 10)

(The foregoing matter concluded.)

Evans & Company
COURT REPORTERS
POST OFFICE BOX 11822
LYNCHBURG, VA 24506
PHONE: (804) 239-2552
FAX: (804) 525-6148

December 17, 1996

HONORABLE J. MICHAEL GAMBLE
Amherst County Circuit Court
100 East Court Street
Amherst, VA 24521

Re: Clyde E. Clements, Jr., v
The Babcock & Wilcox Company, et al
Law No. CL94000218-00
Campbell County Circuit Court

Dear Judge Gamble:

The errata page enclosed herein should supersede the erraa page which was the subject of my December 10, 1996 letter to Your Honor. The first errata page was not complete and was submitted to the Court prematurely as a result of a miscommunication with Mr. Clements. Please note the corrections as stated below:

Page 8	Line 10	deformation should be defamation
	Line 18	"
Page 15	Line 2	deformation should be defamation
	Line 4	"
	Line 7	"
	Line 22, 25	raise should be res

Page 16	Line 22	bear should be bare
Page 18	Line 14	parties should be party's
Page 19	Line 14	disordinate should be disloyal
Page 21	Line 1	Tectrol should be Tetrault
Page 22	Line 4	Echart should be Eckert
	Line 5	Tectrol should be Tetrault
	Line 20	October should be August
Page 24	Line 23	Lori Borgin should be Laurie Boykan
Page 25	Line 1	Abernathy should be Abernethy
Page 26	Line 22	Granger should be Grainger
Page 29	Line 22	bank should be banc
Page 30	Line 13	appellate should be appellant
	Line 14	bank should be banc
Page 32	Line 4	epicable should be equitable
Page 34	Line 7	Blue should be Bloom
	Line 18	acting should be act in
	Line 25	Guire should be Geier
Page 35	Line 9	deformation should be defamation
	Line 23	"
	Line 24	Odonell should be O'Donnell
		443 should be 433
	Line 25	Colter should be Coulter
Page 36	Line 2	deformation should be defamation
	Line 13	"
	Line 17	"
Page 41	Line 18	loss should be law

Please have your secretary place this errata page with your copy of the transcript at your earliest convenience.

Sincerely,
s/ Tammy E. Rosenbaum
TAMMY E. ROSENBAUM

cc: Deborah Hughes, Clerk
Campbell County Circuit Court

Clyde E. Clements, Jr.
Plaintiff

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 15, 1996

Mr. Clyde E. Clements, Jr.
Post Office Box 3391
Lynchburg, VA 24503

Re: Clyde E. Clements, Jr.
v. Babcock & Wilcox Company, et al.
No. 95-1314

Dear Mr. Clements:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

s/ William K. Suter
William K. Suter, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 EAST MAIN STREET
U.S. COURT HOUSE ANNEX
RICHMOND, VIRGINIA 23219

November 26, 1996

Clyde E. Clements
P. O. Box 3391
Lynchburg, VA 24503

Re: 95-2053 Clements v. Babcock & Wilcox Co
CA-92-61-L

Dear Mr. Clements:

We have received your submission by letter dated 11/25/96.

This Court's Local Rule 40(d) states that, except for timely suggestions for rehearing in banc, cost and attorney fee matters and other matters ancillary to the filing of an application for writ of certiorari with the Supreme Court, the Office of the Clerk shall not receive motions or other papers requesting further relief in a case after the court has denied a petition for rehearing or the time for filing a petition for rehearing has expired.

This office is returning your submission pursuant to the provisions of Local Rule 40(d).

I enclose for your information a sheet outlining the procedures for applying to the Supreme Court of the United States for a writ of certiorari.

Yours truly,

PATRICIA S. CONNOR
Clerk
By: /S/ Michael Radday
Deputy Clerk

Enclosure(s)
cc: Jon A. Geier
Jenny Chien-Jen Wu

*
*
*

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

RECORD NO. 95-2053

CLYDE E. CLEMENTS, JR.,
Plaintiff-Appellant,

V.

THE BABCOCK & WILCOX COMPANY,
MERLE T. ALVIS,
JAMES A. CONNER, and
ROGER E. TETRAULT,
in their individual and official capacities,
Defendants-Appellees.

APPELLANT'S MOTION TO VACATE JUDGMENTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

Clyde E. Clements, Jr., pro se
P. O. Box 3391
Lynchburg, Virginia 24503
(804) 846-2521

In The United States Court of Appeals For The Fourth Circuit

Record No. 95-2053

CLYDE E. CLEMENTS, JR.,
Plaintiff-Appellant,

V.

THE BABCOCK & WILCOX COMPANY, et al.
Defendants-Appellees.

APPELLANT'S MOTION TO VACATE JUDGMENTS

COMES NOW the Appellant, Clyde E. Clements, Jr., pro se, and respectfully moves the United States Court of Appeals for the Fourth Circuit to vacate and set aside the following judgments entered in the above-titled action, on the ground of fraud on the Court, pursuant to Fed. R. Civ. P., Rule 60(b)(3), on the part of those Appellate Judges responsible for affirming the District Court's judgments; and on the part of those Appellate Judges responsible for denying Appellant's Petition for Rehearing with Suggestion for Rehearing in Banc:

A. Judgment affirming the District Court's granting of defendants' motion for summary judgment in Civil Action No. 92-00061-L, decided on November 27, 1995, and;

B. Judgment denying Appellant's Petition for Rehearing with Suggestion for Rehearing in Banc, filed on January 12, 1996.

This Motion is based upon the attached memorandum of points and authorities; and upon the record in this action and the record in the court below of Civil Action No. 92-00061-L.

November 25, 1996

Respectfully submitted,

s/ Clyde E. Clements, Jr.
Clyde E. Clements, Jr., pro se
P.O. Box 3391
Lynchburg, Virginia 24503
(804) 846-2521

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

RECORD NO. 95-2053

CLYDE E. CLEMENTS, JR.,
Plaintiff-Appellant,
V.

THE BABCOCK & WILCOX COMPANY,
MERLE T. ALVIS,
JAMES A. CONNER, and
ROGER E. TETRAULT,
in their individual and official capacities,
Defendants-Appellees.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPELLANT'S MOTION TO VACATE JUDGMENTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, LYNCHBURG DIVISION

Clyde E. Clements, Jr., pro se
P. O. Box 3391
Lynchburg, Virginia 24503
(804) 846-2521

*
*
*

REASONS FOR GRANTING THIS MOTION

*
*
*

1. The Presiding District Court Judge and The Appellate Judges Prevented Appellant from Fully and Fairly Presenting his Case.

> *Rule 60(b)(3) Requirements:* * * * The conduct complained of must be such as prevented the losing party from fully and fairly presenting his case or defense.

Rozier v. Ford Motor Co., 573 F.2d 1332 (1978) at 1339.

On January 4, 1995 I filed my motion to extend time to complete my discovery. D.E. 45. On or about January 12, 1995 I served my second set of discovery requests on defendants. D.E. dated 1/12/95. On January 17, 1995 the District Court filed its Order denying my motion to extend time to complete discovery. D.E. 53.

On March 2, 1995 I filed my motion to compel B&W to answer my discovery requests. D.E. 59. In my motion I specifically requested that my motion to compel be heard during the hearing of defendants' motions for summary judgment, which had already been set. On the same day B&W filed its motion to stay discovery. D.E. 58. On March 7, 1995 the District Court filed its Order granting defendants' motion to stay discovery (D.E. 62), thereby denying me a hearing of my motion to compel. The hearing of defendants' motions for summary judgment took place on March 8, 1995. D.E. 66.

The presiding judge then compounded his error by granting defendants motions for summary judgment (D.E. 67

and 68) on the ground that I had presented insufficient evidence in support of my claims.

*
*
*

November 25, 1996

Respectfully submitted,

s/ Clyde E. Clements, Jr.
Clyde E. Clements, Jr. pro se
Post Office Box 3391
Lynchburg, Virginia 24503
(804) 846-2521

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CLYDE E. CLEMENTS, Plaintiff,	)	Civil Action No. 92-0061-L
v.	)	
BABCOCK & WILCOX COMPANY, et.al, Defendants.	)	

ORDER

This matter comes before the Court on Defendants Babcock & Wilcox Company, et. al.'s Motion for the Court to Reconsider its Order Granting Plaintiff's Leave to Amend, filed July 15, 1994. This Court has reviewed the Defendants' Motion and accompanying Memorandum, and all other written submissions of the parties, and has heard the oral argument of the parties. Upon consideration thereof, it appears to the Court that the Motion for Reconsideration should be GRANTED and that Plaintiff's Second Amended Complaint should be stricken as set forth below. It is therefore

ORDERED

That Defendants' Motion for the Court to Reconsider its Order Granting Plaintiff's Leave to Amend is GRANTED, and the following paragraphs of Plaintiff's Second Amended Complaint are hereby stricken: Paragraphs 2 (except for identifying plaintiff and defendants Babcock & Wilcox, Merle T. Alvis, James A. Conner and Roger E. Tetrault); 3 (except for plaintiff's claims under Title VII); 7-8; 10; 12-20; 194-220; and those portions of the Prayer for Relief which reference any defendants other than Babcock & Wilcox, Merle

T. Alvis, James A. Conner, and Roger E. Tetrault, or which reference Counts Four through Nine. In Addition, reference to any individual as a defendant other than Babcock & Wilcox, Merle T. Alvis, James A. Conner, and Roger E. Tetrault, and reference to any cause of action other than those included in Counts One through Three are hereby stricken.

Entered: 6 Sept. 1994 s/ James C. Turk
U.S. District Judge

cc: Barbara Berish Brown, Esq.
Jon A. Geier, Esq.
Jenny C. Wu, Esq.
Paul, Hastings, Janofsky & Walker
1299 Pennsylvania Avenue, N.W.
Tenth Floor
Washington, D.C. 20004-2400

Clyde E. Clements
211-B South Princeton Circle
Lynchburg, VA 24503